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LEADING ARTICLES

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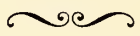

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INSULT IN RETALIATION—THE HUCKABEE CASE*

Wex S. Malone†

There is little comfort in law for the victim of violent and insulting language. In most jurisdictions inflammatory words may be hurled through the air with impunity so long as they injure only the peace of mind and sense of dignity. They do not give rise to a civil action unless they are positively calumnious and work a definite injury to the plantiff's reputation. There is no remedy for vile and abusive epithets simply as such, and one may utter the most obscene and slanderous words of which he is capable provided only that he avoids the ear of third persons and confines his abuse to the hearing of his victim.[1] Even though the words are uttered publicly they seldom afford ground for suit. This is due to the fact that in actions for oral defamation the plaintiff must be prepared either to prove actual damage (which usually is impossible) or to show that the insulting words are members of a highly restricted class of defamatory statements known as words actionable *per se*.[2] The typical garden variety of insults and indecent remarks (son of a bitch, bastard *etc.*) do not fall within this classification, and the victim of their use is helpless.

*Huckabee v. Nash, 183 So. 500 (Miss. 1938).

†Professor of Law, Univ. of Miss.

[1]". . . . the law does not yet attempt to guard the peace of mind or the happiness of everyone by giving recovery of damages for mental anguish for a violation produced by a mere moral wrong. The mere cursing of another (not amounting to slander) is not a violation of a legal right or duty capable of enforcement by process of law. The civil law does not undertake to redress psychological injuries unsupported by actual or nominal damages. The defendant owes the plaintiff the moral duty not to curse her, but this is too delicate and subtle an obligation to be enforced in the rude way of getting money compensation for a violation of this mere moral obligation." Atkinson v. Bibb Mfg. Co., 50 Ga. App. 434, 178 S. E. 537 (1935). 1 RESTATEMENT, TORTS (1934) § 46.

[2]W. T. Farley v. Bufkin, 159 Miss. 350, 132 So. 86 (1931). In this case the following statement uttered publicly was held not actionable *per se* as defamatory, and right to recover for slander was denied since special damage could not be proved: "You have got our goods and don't want to pay for them. This is a hell of a come-off. If you were a lady you would pay us. You are just a bunch of crooks and you are not ladies, and you are just damn liars. We don't want your damn rags back." NEWELL, SLANDER AND LIBEL (4th Ed. 1924) § 20. ODGERS, OUTLINE OF THE LAW OF LIBEL (1897) 2.

However, insult has not been so passively ignored in the southern states. Hotblooded southern cavaliers long ago resorted to the duelling pistol as a convenient instrument of redress for offensive language, and the familiar command to "smile when you say that" was backed by a threat of no small consequence. The field of honor became a tribunal of importance in the settlement of personal disputes and offered a serious challenge to the law. To meet this the legislatures of several southern states enacted anti-duelling statutes in an effort to put an end to this dignified type of slaughter.[3] Although punitive measures were also taken,[4] the anti-duelling statutes were not of this character. The law makers acted on the common assumption that "the jingle of the guineas helps the hurt that honor feels" and sought to subordinate the desire for revenge to the hunger for monetary compensation. To this end, insulting words calculated to lead to a breach of the peace were made the basis of a civil action for damages. It is doubtful, however, that the dull imagination of legislature could be expected to cope with the deeply entrenched and highly romantic institution of duelling, and the anti-duelling statutes failed completely in their original purpose. The practice of resorting to arms in defense of personal honor died only with the pre-war civilization which had engendered it.

However this may be, several of the anti-duelling statutes have persisted and are in active legal service today, offering a much-needed complement to the piecemeal doctrines of defamation.[5] The anti-duelling statute of Mississippi, commonly known as the *Actionable Words Statute*,[6] reads as follows:

> "All words which, from their usual construction and common acceptation, are considered as insults, and calculated to lead to a breach of the peace, shall be actionable; and a plea, exception or demurrer shall not be sustained to preclude a jury from passing thereon, who are the sole judges of the damages sustained; but this shall not deprive the courts of the power to grant new trials, as in other cases."

Of course it is not to be expected that all individuals will passively submit to insult and await their action for damages

[3]Mississippi, *An act to Suppress Duelling*, passed June 13, 1822. Virginia, VA. REV. CODE (1819) c. 157, § 8.

[4]See, for example: MISS. CODE (1840) c. 64, art. 12, tit. 2, § 5. Both principal and seconds subject to conviction. It is interesting to note the effort to prevent parties from crossing into neighboring states for duelling in order to evade the Mississippi laws.

[5]VA. CODE (Michie, 1924) § 5781; W. VA. CODE ANN. (Michie, 1932) § 5471.

[6]MISS. CODE ANN. (1930) § 11.

against a usually insolvent defendant. Insult is calculated to excite the mind to anger and passion, and the natural reaction toward it is one of violence and retaliation with force. The Mississippi legislature has recognized this fact and has provided in substance that insulting language may be considered by the jury in excuse or justification in a criminal trial for assault and battery.[7] By virtue of a broad judicial construction of this statute the same rule is now applicable in suits for damages for assault.[8]

Perchance the offended person may choose neither to institute suit nor resort to physical violence in defense of his dignity. Instead he determines to meet his reviler on the latter's own level and stand his ground, exchanging epithet for epithet, insult for insult. Is he privileged to do so? This was the central problem raised for determination in the recent case of *Huckabee v. Nash*.[9] Huckabee sued Nash under the *Actionable Words Statute*, the gist of the action being that Nash had called the plaintiff a son of a bitch during the course of a heated argument over the weight of a chicken. The trial court instructed the jury in substance that Nash would be privileged to call Huckabee a son of a bitch if in fact Huckabee had first applied the epithet to Nash and the latter had returned the compliment in retaliation through anger and impulse. This instruction was approved on appeal and judgment for the defendant was affirmed.

It is noteworthy that under the facts found by the jury, Nash might successfully have maintained suit against Huckabee for the original insult, and his right in this respect would probably not be affected by the outcome of Huckabee's action against him. Likewise it is safe to assume that neither party could present an effective claim to the sympathy of the jury, although Nash's conduct is perhaps less reprehensible than Huckabee's. If cross actions were permitted in Mississippi and each party were allowed to present his claim to the discretion of the jury without interference by the court, the likely result would be a cancellation of damages or, at best, a very modest verdict in favor of Nash. Unfortunately, this procedure is not available under the present system of practice.

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[7]Miss. Code Ann. (1930) § 1282.

[8]Choate v. Pierce, 126 Miss. 209, 88 So. 627 (1921); Thomas v. Carter, 148 Miss. 637, 114 So. 736 (1927) (Plaintiff called defendant damned son of a bitch, and latter held justified in striking). However, in Alabama a similar criminal statute has been held not applicable in a civil action for assault and battery. Nashville, C. & St. L. Ry. v. Moore, 148 Ala. 63, 41 So. 984 (1906).

[9]183 So. 500 (Miss. 1938).

Questions of privilege under the *Actionable Words Statute* have received but scant attention in the past,[10] and the court's effort to muster up precedent in support of the instant decision was strikingly ineffective. Moreover, any attempt to find an analogy in the common law doctrines concerning privilege in defamation would likely result only in hopeless confusion for future litigation. The rules regulating the conditional privilege to defame have been developed in an attempt to balance the plaintiff's interest in his reputation against the defendant's claim to safeguard his own social or economic welfare. On the other hand, as was previously indicated. the *Actionable Words Statute* was designed, not as a safeguard for the reputation, but rather as a protection of the claim to dignity and to discourage breaches of the peace. Since the interests protected by the law of defamation, on the one hand, and those protected by the Statute, on the other, differ considerably from one another, and since they are not likely to be regarded as of equal social importance under all circumstances, the court should be very reluctant to transpose material from the law of defamation into a foreign field.

Let it be supposed, however, that the analogy were proper for the instant case, and let it be further supposed that Huckabee had sued Nash for slander under the same set of facts. The court would have great difficulty in sustaining the position that the defendant was privileged to defame because he acted in righteous anger and indignation brought about by Huckabee's own previous insult. In order for defamation to be privileged it must be of a nature calculated to forestall a real injury threatened to some social or economic interest claimed by defendant, and it must be uttered under such circumstances that it would reasonably tend to be effective in promoting this desired end.[11] The privilege to defame is not extended in compassion for the defendant's emotional instability. Justifiable anger and heat of passion are in no manner extenuating circumstances in an action for slander. Even well-grounded belief in the truth of a defamatory statement affords no protection if the statement is not otherwise privileged. Indeed, a

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[10]The testimony of a witness in a judicial proceeding is not actionable under the statute. Verner v. Verner, 64 Miss. 321, 1 So. 479 (1886). In several other decisions where at first blush it might appear that a question of privilege is involved, it will be found that the real inquiry concerned whether or not the words uttered were "insulting". See, for example, Cooper v. Davidson, 172 Miss. 74, 157 So. 418 (1935), and other decisions cited in the Huckabee case, 183 So. 500 (Miss. 1938).

[11]See the leading English case, Harrison v. Bush, 5 E. & B. 345, 119 Eng. Rep. 509 (1855). Hines v. Schumacher, 97 Miss. 669, 52 So. 705 (1910); ODGERS, AN OUTLINE OF THE LAW OF LIBEL (1897) 122; HARPER, THE LAW OF TORTS (1933) § 247.

privilege may be rendered ineffective if the manner of the defamatory utterance indicates ill-will, hatred, malice or a retributive motive.[12]

It is commonly said that an action for defamation cannot be maintained by one who has consented to the defamatory utterance. Could it be successfully argued that the plaintiff consented to being called a son of a bitch by reason of having used the epithet himself in the presence of the defendant? It appears that this contention must fail unless the term *consent* is given a much broader significance than its presently accepted one. Consent implies an outward manifestation of a receptive attitude.[13] It must reasonably appear to the defendant that the plaintiff is willing to have the term applied to him. The facts of the instant case indicate quite the contrary. The very circumstance that the plaintiff used the epithet in order to degrade the plaintiff and considered it sufficiently derogatory as an expression of his contempt for the latter clearly indicates that he did not invite its use in reference to himself.

Indications seem to point to the fact that the result reached in the *Huckabee* case cannot be supported by analogy to the law of defamation. However, there are other fields of law in which the comparison may be more apt. Perhaps the privilege to use insulting language in retaliation finds its counterpart in the rules regarding physical affrays. To support this position it may be pointed out that the policy underlying the *Actionable Words Statute* is the prevention of breaches of the peace, and this same policy is the determinative factor in the make-up of the law of assault and battery. The aggravated state of the defendant's mind is an important consideration in either type of action. However, under common law doctrines the comparison is likely to end here. Passion and the heat of anger may serve to reduce a charge of murder to manslaughter, or in a civil action may be considered by the jury in mitigation of damages;[14] but consideration for the emotional state under which the defendant acted has never been regarded as complete justification for a battery.[15] The claim to freedom from physical aggression is regarded in the eyes of the common law as too important to be thus easily sacrificed in the

[12]Hines v. Schumacher, 97 Miss. 669, 52 So. 705 (1910); Kroger Grocery & Baking Co. v. Harpole, 175 Miss. 227, 166 So. 335 (1936). HARPER, THE LAW OF TORTS (1933) § 252.

[13]3 RESTATEMENT, TORTS (1938) 583, comment *a, b, c, d.*

[14]Empire Clothing Co. v. Hammond, 17 Ala. App. 60, 81 So. 838 (1919); Chapman v. Lamp, 189 Iowa 771, 179 N. W. 50 (1920). See cases collected 6 C. J. S. 807-809, § 17, n. 13, 14.

[15]Armstrong v. Little, 20 Del. 255, 54 Atl. 742 (1902); Gargatto v. Isenberg, 244 Ky. 493m 51 S. W. (2d) 443 (1932); Also cases cited note 14, *supra.*

interest of uncontrolled impulse. If plaintiff had threatened defendant with physical violence, clearly defendant could have resisted and met force with force. It might be urged that the privilege to meet epithet with epithet is grounded on the same idea of self-defense. However, it is believed that such is not the case. The privilege of self defense is given solely for the purpose of forestalling an attack, or at least mitigating its force. It is not the law's intention to condone retaliation simply because retaliation is often made in the heat of anger. The truth of this becomes apparent when it is recalled that no person can justify a single defensive blow which he cannot convince the jury was reasonably necessary for his protection. He is liable for all excessive force.[16] It is clear that a retaliatory epithet in no way obliterates the stigma of the original insult, nor does it have the slightest effect in preventing further verbal abuse by the assailant.

As was previously noted, the Mississippi legislature has abrogated the common law rule that insulting language is no defense to an action for an assault.[17] Safety has been subordinated by the lawmakers to the defendant's claim to dignity and freedom from effrontery.[18] Similar statutes will be found in other southern states.[19] This unique policy appears to afford ground in support of the *Huckabee* case. If a defendant is justified in replying to an insult by the use of physical force; if he may thus invade the most closely protected interest known to the law, surely he may adopt a less extreme measure and simply return insult for insult.[20] This should be true even though the use of opprobrious epithets is perhaps a less dignified method of retaliation than a well aimed blow in defense of manly honor.

At least two further reasons might be advanced in justification of the privilege asserted in the *Huckabee* case. In the first

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[16]Ogden v. Claycomb, 52 Fed. 365 (1869); Willis v. State, 27 So. 524 (Miss. 1900); HARPER, THE LAW OF TORTS (1933) § 47; 1 RESTATEMENT, TORTS (1934) § 70.

[17]See statutes and cases cited notes 7 and 8, *supra*.

[18]However, it was intimated in Thomas v. Carter, 143 Miss. 637, 639, 114 So. 736 (1927), that a defendant would not be justified in the use of a deadly weapon in retaliation to an insult; *cf.* Coleman v. Y. & M. V. R. R., 90 Miss. 629, 43 So. 473 (1907).

[19]See, for example ALA. CR. CODE (1896) § 4345. In Texas a similar statute made insulting language concerning a female relative justification for an assault. See Morrison v. State, 61 Tex. Cr. 223, 135 S. W. 551 (1911). In this latter case defendant was held justified in assaulting plaintiff because the latter had stated in reference to defendant's wife that no decent woman would ride horseback astride. This was indirectly communicated to defendant.

[20]In Virginia provoking circumstances may be considered in mitigation of punishment in a criminal proceeding for insulting language. VA. CODE (Michie, 1924) § 4536(a).

place, it can be effectively urged that the plaintiff, Huckabee, was not one of the class of persons for whose protection the Statute was intended. By indulging in the free use of indecent language he has demonstrated himself to be a person of hardened sensibilities and cannot appropriately lay claim to the presumption of injury which is implicit in the Statute. Under this view the court is not likely to show more respect for the feelings of such a plaintiff than he himself showed for the feelings of the defendant.

A second reason lies in the reluctance of the courts to intervene in favor of one wrongdoer against another, and particularly where the plaintiff is more blameworthy than the defendant.[21] If parties voluntarily engage in an embroilment and cast vulgar and indecent recriminations at one another, they may lower their own sense of propriety to meet the occasion, but they cannot impose on the judicial dignity of the court and demand that it adjust their differences. Possibly, however, the court would not be indisposed toward allowing compensation to the present defendant, should he seek its aid. His conduct was less objectionable than plantiff's. His retort was made in the heat of anger, and the indecency of his reply can hardly be deemed to have rendered the plaintiff's effrontery less objectionable. In allowing him recovery the court would probably be carrying out the primary purpose of the Statute by discouraging the unprovoked use of insulting language.

[21]This is probably the underlying basis of the refusal of the courts to allow contribution or indemnity between joint tort feasors, and the refusal to recognize comparative negligence. The idea finds expression in the maxim, *in pari delicto potior est conditio defendentis (et possidentis).*

RE-THINKING NEGLIGENCE—PARTS II. AND III.

Julian P. Alexander

II. THE SIMPLE TOOL DOCTRINE

How simple is a "simple tool"? How simple is the Simple Tool Doctrine? How simple are those who subscribe to the Simple Tool Doctrine? This article seeks to invite a reasonable and deferential consideration of these inquiries.

In a former discussion[1] it was attempted to show that the so-called doctrine of assumption of risk was justified by neither reason nor justice. An anomaly itself, it has consistently fostered anomalous doctrines which, claiming its paternity, are marked with its innate deformities.

It was sought to show that this was an ill-advised incursion into the field of torts[2] and rightly analyzed, was found to be either (1) a method of expressing the non-negligence of the master in terms of the conduct of the servant, or, (2) a euphemism for contributory negligence of the servant. The true basis should have been the failure of either the master or the servant, or both, to use requisite care. In turn, the negligence itself should always have been adjudged in the light of *knowledge*, actual or implied.

It is our purpose here to give scrutiny to a doctrine which, inspired by the remarkable immunizing potency of "assumption of risk", evolved into that "banner with the strange device" known as the "Simple Tool Doctrine".

Since "assumption of risk" was all the employer needed to insulate himself against liability and to distract attention from his own responsibility, the so-called Simple Tool Doctrine gained prestige as a device which, raised and interposed between his negligence and the injury to the servant, forbade[3] any view by the injured servant of the master's negligence.

Instead of involving the question of negligence, it became a pet and pat phrase to indicate that the resulting injury involved no negligence on his part. As heretofore pointed out, since assumption of risk as a doctrine was justified solely as a convenient indi-

[1](1939) 11 MISS. L. J. 290.

[2]Comparison is invited to the so-called 'family purpose doctrine' which, dignified by an arresting name, gained local prestige and respect, abided its destined hour and went away. Smith v. Dauber, 155 Miss. 694, 125 So. 102 (1929).

[3]It is interesting to note that the 'doctrine' as such is not mentioned by LABATT, MASTER AND SERVANT (1904), nor by THOMPSON, NEGLIGENCE (2nd ed. 1901).

cation that the master was not negligent, no confusion attended the designation of the servant's injury from a defective simple tool as an "ordinary" and therefore assumed risk. But as in the case of the "doctrine" of assumption of risk, its acceptance as a complete bar to any liability on the part of the master forestalled any inquiry into the matter of the master's negligence or responsibility. Nor, indeed, was the servant's conduct in knowingly using a defective tool adequately appraised as negligence. The tool was simple and the servant should have known its dangers; the servant, too, was equally simple and should have known better than to use it. Such was the reasoning.

The early cases justified the doctrine in different ways. Analogies were drawn to cases where the duty to repair or maintain was delegated to the servant; when the conditions of work progressively changed; the special knowledge or means of knowledge by the servant; the privilege and duty of the servant to repair or substitute another tool; bases suggesting the servant's choice of the less safe of two alternatives; also a general grouping of illustrations emphasizing practical considerations[4] and public policy.[5]

Chiefly, however, the servant was chargeable equally with the master as to obvious defects.[6] As with contributory negligence, and its more potent and popular twin, assumption of risk, the equal knowledge by both the master and the servant nevertheless operated unequally to convict the servant of responsibility and to acquit the master.

Since simple tools ordinarily do not cause injury[7] and rarely serious injury, the Simple Tool Doctrine developed upon the illogical idea that there was some inherent magic in the phrase itself. Strangely enough, the courts and textwriters with astonishing unanimity, phrased the doctrine in terms of a complete absence of responsibility on the master's part. "The master owed no duty to the servant with regard to simple tools", is the way it is usually stated. And its echo, "the master is never negligent with respect to simple tools or appliances."

It is surprising that the master's duty was defined and his negligence appraised, not with reference to simple principles, but simple tools. There was no gradation of responsibility commensurate with the complexity of the appliance. Once a tool was vouchsafed a classification as "simple" the matter was ended. Christ-

[4]See LABATT, MASTER AND SERVANT (1904) 1126, 1129.
[5]Middleton v. National Box Co., 38 F. (2d) 89 (S. D. Miss. 1930).
[6]Sheridan v. Gorham Mfg. Co., 28 R. I. 256, 66 Atl. 576 (1907).
[7]Compare Newbern v. A. & P. Co., 68 F. (2d) 523 (1934).

ened the "Simple Tool Doctrine", its rationale was found to be anything but simple. Courts vied with each other in defining how simple is a simple tool.[8]

How Simple is a Simple Tool?

At this point let us examine the most acceptable definition of these simple complexities. It may be said that the significance of the designation "simple" is that it imports to the ordinarily prudent user a complete picture of its condition and hazards at all times and thereby dispenses with any duty on the master's part to inspect it. Moreover, it involves at most only ordinary and familiar hazards, and all defects become immediately obvious in their use. The limitation of the classification to tools adapted to manual use[9] not only meets the foregoing conditions but forestalls the confusion which follows an extension to appliances used otherwise than manually. Perhaps the requirement that such tools be such as are subjected to no stress other than muscular effort[10] is sufficiently comprehensive to meet the test. It is apparent that such tools are but projections of and aids to mere muscular effort, and as such must invariably be subjected by their very use to a complete scrutiny by the user.

It is important that a distinction be maintained between simple tools and simple elements of a complex apparatus or appliance. It is not enough that the instrument be simple, but it must be a tool. Otherwise the rationale does not include it. For example, a hose is a simple appliance.[11] But as a part of an engine or boiler it loses its identity as such.[12] So a ladder, as such, may be so classified;[13] yet when it is used permanently to contribute to the accessibility of the place or work it is gauged with reference to "safe place" doctrines.[14]

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[8]An example is seen in Towne v. United Electric Co., 146 Cal. 766, 81 Pac. 124 (1905). There were four separate opinions—one in chief, one concurring and two dissenting, each suggesting different bases.

[9]Lovewell v. Winchester Fire Ins. Co., 124 Mass. 420 (1878).

[10]Tampa Shipbuilding Co. v. Thames, 179 So. 705 (Fla. 1938).

[11]Houston *etc.*, Co. v. Patrick, 50 Tex. Civ. App. 491, 109 S. W. 1097 (1908).

[12]Hercules Powder Co. v. Tyrone, 155 Miss. 75, 124 So. 74 (1929). No one should question the master's duty to maintain the hose. However, the writer would extend this duty to cover the hose even when and if viewed as a simple tool. In the cited case, the complexity of the appliance and the great probability of great injury would call for greater pains by the master. Yet the same rule of "Requisite Care" should apply regardless of whether compliance with such duty may, in case of a simple tool, be adjudged solely by the act of entrusting such tool to one who appreciates its use and its dangers. Compare Newbern v. A. & P. Co., 68 F. (2d) 523 (1934).

[13]Sheridan v. Gorham Mfg. Co., 28 R. I. 256, 66 Atl. 576 (1907).

[14]Laurel Mills v. Ward, 134 Miss. 447, 99 So. 11 (1924).

So a nail,[15] or a pipe,[16] or any device however simple loses its identity as a simple tool when it is not used as such.[17] A device subject to manual use may be simple and yet because of its disproportionate weight, considered as affecting the principle of safe place to work or safe instrumentalities, is no longer a simple appliance within the rule.[18] A chisel is a simple tool,[19] but if its use is required in a dangerous manner, the case becomes one of negligence in furnishing an unsuitable and hence dangerous tool.[20] Or if it is entrusted to an inexperienced servant, the effect of the automatic imputation of knowledge is lacking and the doctrine does not apply.[21] On the other hand, the servant solely is negligent in using a safe appliance in an unsafe manner.[22]

These references illustrate the necessity for keeping the emphasis upon knowledge. Under the doctrine no knowledge is imputed to the master. This is true in spite of exceptional cases where the servant's knowledge may be affected by phases which take the case out of the narrow confines of the doctrine.

The links in the chain of reasoning were as follows: (1) the injury, (2) by a tool supplied by the master which, (3) pursuant to an evolved formula, was denominated "simple", with the result (4) that the servant by its use was *ipso facto* held to have assumed the risk, and which phrase (5) *ex proprio vigore,* resulted in a legal finding that the master was not negligent.

It may as well be said at the outset that our courts have consistently followed an inconsistent reasoning in engrafting the simple tool doctrine as an exception to the rule that the master must use reasonable care to furnish the servant with tools that are reasonably safe. The usual phrasing is that "the master is under no duty to furnish the servant with a safe simple tool."[23]

It is deferentially submitted that the master's duty to the servant (in the absence of special contract), like the burden of proof, never shifts. However, this involves the correlative truth that this duty may be complied with in the case of a simple tool

[15]Vanderpool v. Partridge, 79 Neb. 165, 112 N. W. 318 (1907).
[16]Standard Oil Co. v. Franks, 167 Miss. 282, 149 So. 798 (1933).
[17]City of Panhandle v. Byrd, 77 S. W. (2d) 904 (Tex. Civ. App. 1934). A chain, though itself simple, was so used as to make the place of work unsafe.
[18]Goodyear Yellow Pine Co. v. Mitchell, 168 Miss. 152, 149 So. 792 (1933).
[19]Bear Creek Mill Co. v. Fountain, 130 Miss. 436, 94 So. 203 (1922).
[20]Newman Lbr. Co. v. Cameron, 179 Miss. 217, 174 So. 571 (1937).
[21]Dobbins v. Lookout O. & R. Co., 133 Miss. 248, 97 So. 546 (1923).
[22]Y. & M. V. Ry. v. Skaggs, 181 Miss. 150, 179 So. 274 (1938).
[23]This is the language employed in the following cases: Wausau Lbr. Co. v. Cooley, 130 Miss. 333, 94 So. 228 (1922); Bear Creek Mill Co. v. Fountain, 130 Miss. 436, 94 So. 203 (1922); Allen Gravel Co. v. Yarbrough, 133 Miss. 652, 98 So. 117 (1923), and later cases.

with no more positive conduct than that of seeing that the servant understands its use and its hazards.[24]

Our court in *Wausau Lbr. Co. v. Cooley*,[24a] laid down the rule in the language quoted. Some may feel that this quotation reveals an absence of due care on the part of our own tribunal whose rare lapse into casual inexactitude is reassuring, though not available, to members of the bar whose written instruction, often so phrased, are on appeal found to assay too high a rubber content. If the master is under no duty in this respect he can never be liable when the servant is injured by a defective simple tool, provided the master can convince the court that it is comprehended within the definition. The contrary is illustrated *supra*.[25] Such cases should be restricted, as all negligence cases, to the principles of reasonable care and reasonable safety. Moreover, the servant must exercise reasonable care. He alone is responsible if he voluntarily uses a simple tool in an unusual way,[26] whether the doctrine is invoked or not; and the master is liable for compelling such use[27] even though it is a simple tool.[28] The master is under no duty to furnish any tools that are safe. He is no insurer. Nor is his duty absolute.[29]

It should be frankly admitted that such doctrines as are anchored upon so illogical a base as assumption of risk, or any base other than negligence *vel non* of the master, will drift with the same conflicting tides that make them such unstable moorings. Insistence upon a logical criterion would require that all tort cases

[24]See note 12 *supra*. Since the writer advocates the abolition of the doctrine, it should be added that, since the knowledge and appreciation of the servant is the controlling factor, it is of no consequence whether the tool is simple or complex. Although our court was not discussing a simple tool in Newell Construction Co. v. Flynt, 172 Miss. 719, 161 So. 298 (1935), the following language therefrom being applicable to all tools, (1) furnishes a basis for abolishing all distinction between simple and complex tools, and (2) demonstrates why, in case of so-called "simple tools", the master has complied with his duty, although he has made no inspection: "Reasonable safety of a tool . . . . means one which can be safely employed when the servant takes reasonable care in its normal use or operation."

[24a]130 Miss. 333, 94 So. 228 (1922).

[25]See notes 11-23, *supra*.

[26]Moran v. Brown, 27 Mo. App. 487 (1887).

[27]Newman Lumber Co. v. Cameron, 179 Miss. 217, 174 So. 571 (1937).

[28]Compare Bryant v. R. R., 147 Miss. 421, 111 So. 451 (1927) where the servant was compelled to expose himself, over his objections, to inclement weather—not a simple tool of course, but a simple and well understood danger. Such an exposure, voluntarily incurred, was held in Yazoo City Transp. Co. v. Smith, 78 Miss. 140, 28 So. 807 (1900) to be one whose dangers were best known to the servant himself, and recovery was denied under the defense of assumption of risk. This serves to illustrate that it is the simplicity and not the tool that is controling.

[29]Gulfport Groc. Co. v. White, 171 Miss. 127, 158 So. 86 (1934); Columbus *etc.*, R. R. v. Coleman, 172 Miss. 514, 160 So. 277 (1935); Eagle Cotton Oil Co. v. Pickett, 175 Miss. 577, 166 So. 764 (1936); Central Granory Co. v. Ault, 75 Neb. 249, 106 N. W. 418 (1906).

involving defective or unsafe tools—or for that matter all master-servant cases *ex delicto*—be adjudged primarily from the standpoint of the master, his breach of duty and resultant negligence. To do otherwise compels acceptance of postulates which defeat the servant's recovery upon grounds affecting his conduct alone. At most they but reveal cases where no definite defense is needed because the master is not deemed negligent. This is true of most cases of assumption of risk. Legal doctrines should relate to the establishment of liability or the defense thereto. Accordingly, the master's defense must legally and logically relate to the servant's negligence adjudged in the light of his knowledge.

Let us examine the foundations upon which our own court has builded our acceptance of the doctrine. In the leading case[30] the court quoted with approval the basis of *respondeat superior* as laid down in an annotation in a well known report,[31] as follows:

> "The rule of *respondeat superior* rests upon the assumption that the employer has a better and more comprehensive knowledge than the employee, and therefore ceases when the employee's means of knowledge of the danger to be incurred is equal to that of the employer. Such is the case where the instrument or tool is of so simple a character that a person accustomed to its use cannot fail to apprehend the risks incident thereto."

The defects in this simple statement are obvious to anyone accustomed to use the doctrine, and cannot fail to be appreciated.[32] Such a foundation is unstable in that the writer did not use reasonable care to construct a definition that was reasonably safe for use by students of law. In the first place the equal knowledge doctrine should not apply to simple tools since no knowledge is imputed to the master, and when he has actual knowledge (of a defect), the basis of the doctrine (no duty to inspect) is gone. Even grammarians may question whether "*superior*" is not a noun rather than an adjective. There is a vague intimation that the phrase implies a superior knowledge by the master. Yet the Simple Tool Doctrine is *sui generis* in that the master seldom has actual knowledge and is not presumed so to have.

On the other hand, the doctrine of *respondeat superior* is not a rule by which to gauge the duty of the master to the servant.

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[30]Wausau Lbr. Co. v. Cooley, 130 Miss. 333, 94 So. 228 (1922).

[31](1908) 13 L. R. A. (N. S.) 668.

[32]Some atonement is later made by the annotator by his recognition of the knowledge factor as controlling and his concession that the mere simplicity of the tool does not exempt the master from all care in respect thereto.

Chiefly it refers to the basis of the master's liability for his servant's injuries to third persons, including another servant.[33] As a basis for the simple tool doctrine, it is in-artificial and inapt.[34] This same paragraph has been handed down from case to case as the base upon which each tribunal may unveil the emblem of the Simple Tool.

It was as if the annotator were seeking a play upon words. Although assumption of risk involved the principle of equal knowledge, and the simple tool doctrine is based upon the superior knowledge of the servant, it would be no less apt to invent the phrase "*respondeat inferior*". For in fact the servant's knowledge is almost invariably superior. It is of course the superior knowledge that controls here and not the superior position. The master's liability is to be determined not by examining whether the servant's knowledge is equal to the master's but whether it is equal to the occasion. This makes inappropriate the use of the phrase "equal means of knowledge". Since the master is under no duty to inspect, he need not avail of any means of knowledge. Equal duty must first exist.

The defect in the tool becomes a condition with reference to which the servant is to regulate his conduct,[35] not unlike the theory of the "Last Clear Chance" doctrine. Thus viewed, the servant's responsibility is one hundred percent and the question of liability is properly resolved with reference to the indispensable factor of proximate cause. Some courts analogize the doctrine to the principle governing the masters responsibility where the place of work is constantly changing as the work progresses.[36]

The writer's solution of the complex doctrine of the simple tool is that the master, as always, owes the servant reasonable care to furnish a reasonably safe tool, but such duty is as a matter of law, complied with when the master furnishes an intelligent servant with a tool which meets the definition heretofore suggested.

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[33]Perfection *etc.*, Co. v. Windham, 182 So. 6 (Ala. 1938).

[34]Yet this expression furnishes the background, if not indeed the ground, for similar holdings in the subsequent cases: Allen Gravel Co. v. Yarbrough, 133 Miss. 652, 98 So. 117 (1923) and Jones v. Southern United Ice Co., 167 Miss. 886, 150 So. 652 (1933).

[35]Compare the view of Judge Taft in Narramore v. R. R., 96 Fed. 298 (C. C. A. 6th, 1899): "Contributory negligence .... is that action or nonaction in disregard of personal safety by one who, treating the known danger as a condition, acts with respect to it without due care of consequences." See also Fuller v. R. R., 100 Miss. 705, 56 So. 783 (1911); Daniel v. Livingston, 168 Miss. 311, 150 So. 662 (1933); Ross v. R. R., 178 Miss. 69, 172 So. 752 (1937).

[36]*Held*: in Towne v. United El. Co., 146 Cal. 766, 81 Pac. 124 (1905) that the master is not required to keep constant watch over (simple) tools as to detect every deterioration due to constant use.

It is not an affectation to express it otherwise by saying that the duty is complied with by an inspection solely of the servant.

The federal court of the Fourth Circuit[37] defined such tool as one where "even if defective, no danger is reasonably to be expected". The court further contributed to the clarity of the doctrine by justifying it "not because the employee assumes the risk of injury from defects in such tools, but because the possibility of injury is so remote as not to impose on the master the duty of seeing that they are free from defects in the first instance, or of inspection of them thereafter."

It is necessary to moor the doctrine to this base so as to preserve its integrity (if it is to be preserved) as a concept of negligence. As such it may be maintained as a rule of evidence rather than of substantive law, dealing with factual states rather than fixed patterns. Thus it becomes not an exception to the rule as to the master's duty but merely illustrative thereof.

It may be repeated that the doctrine serves its complete purpose when it emphasizes that the master is not chargeable with knowledge of the condition of a simple tool. Since it goes no further, it must follow that if and when the master has actual knowledge of a defect which prevents it from being reasonably safe, the evidential aspect of the doctrine vanishes and the master's negligence and consequent liability are adjudged just as in the case of any other tool or appliance.

This step is probably the most anyone may hope for at this time. However, once the phrase has lost its magic as a slogan of immunity (*i.e.*, by being restricted in its application to cases where the master has no actual knowledge of the defect) it will be found vulnerable to further attack. The next—and proper—step will be to liquidate it altogether. It ought not to be a doctrine where statements of fact are crystallized into standardized patterns to bind the courts.[38]

Although the doctrine as such should be abolished, in the meantime it should be restricted narrowly to cases consistent with its

[37]Spain v. Powell, 90 F. (2d) 580 (C. C. A. 4th, 1937).

[38]This view finds hearty support in a recent federal decision, Quanah *etc.*, Ry. v. Gray, 63 F. (2d) 410 (C. C. A. 5th, 1933) which joins in the view that there is no distinction in legal principle between a simple and a complex tool, aptly suggesting that otherwise a hardware catalog may be used as a digest, the recovery being dependent upon which page the tool in question is displayed. *Cf.* Drake v. San Antonio & A. P. R. Co., 99 Tex. 245, 89 S. W. 407 (1905).

In a late Mississippi case our court refused to adopt a standardized pattern of cattle-gap as conclusive evidence of due care. Favre v. L. & N. Ry., 180 Miss. 843, 178 So. 327 (1938). It may be a hopeful augury.

rationale. It should be deemed descriptive merely of those cases where, due to the simplicity of the tool and the understanding of the servant, extra precautions to be taken by the master are for practical purposes non-existent.

In seeking to justify retention of the doctrine some courts have invoked practical considerations in an endeavor to attain a *reductio ad absurdum*. For example it is argued that it would be unreasonable to require the master to inspect or be responsible for the condition of such tools. That it is unreasonable to require the master to inspect every shovel, or each nail, or a housekeeper to examine her brooms. Further, that it is reasonable to require the servant to do so. Moreover, it is contended that the injuries are rare and rarely serious, that the servant is obliged to use reasonable care for his own safety, and that, in the case of a simple tool, such care usually reveals any defects.

If there is any merit in these contentions they should be addressed to trial juries, no doubt with appropriate effect. No such argument has been advanced to compel terrorized pedestrians to assume the risk of using the streets on the ground that there are too many injuries to avoid, and that many of their injuries are after all *de minimis*.

The inoffensive house broom, often cited as the ultimate in simplicity, may be here rescued from the pit of examples *ad absurdum* and boldly re-examined.[39] Assuming that the broom is the simplest of the simple tools, let us suppose the master exposes a substantial splinter upon its handle, and in order to vent some secret malice toward his servant, taints it with poison. The resultant injury, aside from creating criminal responsibility, would undoubtedly give rise to substantial actual and punitive damages. By eliminating the poison as a factor, perhaps there would be no criminal prosecution, but such damages as resulted in slight infection would, even though negligible, be nevertheless exigible. If the splinter, though not purposely exposed, was known to the master, the only change in results would be the right only to actual damages, which to the servant would be just as great. What would be the effect if the injury were only a scratch? As a practical proposition the matter would probably be completely adjusted in the forum of a first-aid station. Yet the controlling principles follow the illustrations down past the stage where litigation ceases to be profitable and convenient. But legal principles do not vary with

[39]The rules of Master and Servant apply to domestic servants. Eaton v. Wallace, 287 S. W. 614 (Mo. 1926). Other cases discussing splinters and trivial devices are: Stirling *etc.* v. Fork, 141 Ky. 40, 131 S. W. 1030 (1910); Hedicke v. Highland Spgs. Co., 185 Minn. 79, 239 N. W. 896 (1931).

the fruits of their application, and should never be classed as *de minimis*. Text-writers could with equal reason fashion a doctrine out of splintered tools as out of simple tools. The splinter on a log of fire-wood[40] or on a wooden crate may be natural and expected,[41] but it is not normal or inherent in a tool handle.

Such eventualities may safely be left to adjust themselves as do the thousands of cases of nominal injuries. The courts should, except where the servant's negligence is disproportionate or the master's negligence is too trivial to sustain a verdict, leave such arguments to be heard by the juries or considered by prospective litigants, thus avoiding too many exceptions to well-established principles. The duty is not measured by the probability of great injury, but by the great probability of some injury.

In this more or less hazy penumbra there would be at most a mere scintilla,[42] and these cases could be disposed of under the maxim *de minimus non curat lex*. In such event there would, as in all cases of a furnished appliance, be a gradation of complexity up to a contrasting extreme where the liability of the master would be (a) *prima facie*; (b) his negligence *per se*; (c) the danger so great as to require the highest degree of care;[43] or (d) the negligence statutory.

Between these two extremes will fall the usual run of negligence cases where the jury may take into account all proper factors—the simplicity of the tool gauged with reference to the experience of the servant; the skill of the servant gauged with reference to the complexity of the tool—all tending to the solution of liability of either or both with reference to a common duty to use requisite care.[44]

There is no reason why the simplicity of the tool should justify a different or separate doctrine when the simplicity of the servant does not do so. Even if the tool is simple the master is held liable when he places it in the hands of a servant who, as to

[40]Ft. Worth *etc.* Ry. v. McCrummen, 63 Tex. Civ. App. 594, 133 S. W. 899 (1911).

[41]Hedicke v. Highland Spgs. Co., 185 Minn. 79, 239 N. W. 896 (1931).

[42]Since the scintilla rule has been abolished, Y. & M. V. Ry. v. Lamensdorf, 180 Miss. 426, 178 So. 80 (1938), such cases could still be disposed of by the court as insufficient in law. Yet such dismissal should be seen not as pursuant to a set formula but primarily because of insufficiency of fact.

[43]Farmers Gin Co. v. Leach, 178 Miss. 784, 174 So. 566 (1937).

[44]I presume to repeat a definition of "Requisite Care" ventured in a former article in the series (1939) 11 MISS. L. J. since, regardless of the person, place or thing, the correlative duties of the master and the servant here become focused on this common point. Requisite care, then, is care commensurated with appreciated danger appraised in terms of ordinary prudence and interpreted in the light of the attendant circumstances.

it, is himself simple.[45] So where the tool is complex the skill of the servant is just as important a factor. Always the test gets back to *knowledge*.[46]

The exception of conductors and engineers in charge of trains from the immunities granted by Section 193 of the Mississippi Constitution (Section 6154 of the Code of 1930)[47] has much in common with the imposition of responsibility upon a servant who has exclusive control, use and knowledge of a simple tool. Yet a hammer and a modern locomotive represent respectively negative and positive poles of complexity. Since the controlling inquiry is knowledge, the mere simplicity of the tool does not bar the servant if he in fact does not understand it.

All these considerations revolve about the matter of probabilities of injury. The simplicity or complexity of the tool is in point, not as suggesting, as heretofore stated, a probability of greater or less injury, but rather greater or less probability of some injury.

That the servant's use of a simple tool known to be defective is negligent is shown by the following illustration which throws out of focus all factors save that of the servant's conduct notwithstanding knowledge: if the servant, knowingly using a defective and dangerous tool, injures a third person, the latter should be entitled to sue the servant or under the doctrine of *respondeat superior*, the master. Either action would be based upon the negligent act of the servant,[48] and in the suit against the master his liability would be referable to his negligence in setting in motion a dangerous combination of forces, to wit, a servant and a tool, at least one of which was defective.

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[45]Dobbins v. Lookout Oil & Ref. Co., 133 Miss. 248, 97 So. 546 (1923). Here the servant was a minor and inexperienced in the use of a chisel—a simple tool. So in Middleton v. Faulkner, 180 Miss. 737, 178 So. 583 (1938). Yet in the recent case of Sanders Cotton Mill v. Bryan, 181 Miss. 573, 179 So. 741 (1938) our court held there can be no recovery by a minor merely because he is such. If this were otherwise, we should have a Simple Servant doctrine, no less illogical than a Simple Tool doctrine.

See Edw. Hines Lbr. Co. v. Dickerson, 155 Miss. 674, 125 So. 93 (1929).

[46]Our court in Wilson & Co. v. Holmes, 180 Miss. 361, 177 So. 24 (1937) makes the test of negligence action or non-action gauged with reference to the knowledge both of the appliance, and the reasonably anticipated results of the course followed. The test here was applied to the defendant, but logically applies to either party. See Newell Const. Co. v. Flynt, 172 Miss. 719, 728, 161 So. 298, 301 (1935); and Kress v. Markline, 117 Miss. 37, 77 So. 858 (1917) emphasizing that either may presume the other has used due care.

[47]Abolishing the effect of knowledge of defects as presumptively negligent.

[48]A servant's failure to avoid a known danger . . . . was (contributory) negligence. Reynolds-West Lbr. Co. v. Taylor, 23 F. (2d) 36 (C. C. A. 5th, 1927).

Where the master has no actual knowledge of a defect in a simple tool, the servant who is injured in its use is denied recovery on the principle that he alone is negligent, and he cannot of course charge the master with responsibility for an act committed by the servant himself.[49]

The Mississippi Cases

Our own court has applied the Simple Tool Doctrine in many cases, relating it almost invariably to the so-called doctrine of assumption of risk. There is no doubt that where there is a defect in a simple tool, possible injury therefrom is assumed as an inherent risk. This means only that the master is not negligent.[50] Such a conclusion may still be applied as a common-law principle, since Section 513 of the Code does not forbid such defense.

Parker v. Wood Lumber Co.,[51] was decided prior to the enactment of Section 513 of the Code abolishing the defense of assumption of risk when the master is negligent. The tool here was a cant hook, and was held not to be a simple tool. The court said, "It is only when circumstances make it the duty of the servant to inquire (inspect) that it is contributory negligence not to do so." Although not a simple tool case, the court presaged much that was to follow in considering such cases. In the quoted excerpt it is more than intimated that in case of a simple tool the circumstances make it the duty of the servant to inspect and that his failure to do so or its use in spite of knowledge of a defect, is negligence.

The case is useful in emphasizing that equal means of knowledge is not the same as equal knowledge. Yet, as to the servant, a simple tool furnishes both the means of knowledge and (presumptively) the knowledge. The court said further: "It (equal

[49]Edw. Hines Lbr. Co. v. Dickerson, 155 Miss. 674, 125 So. 93 (1929). An interesting case in point here is Daly v. Lee, 167 N. Y. 537, 60 N. E. 1109 (1901). Here a servant, using a simple tool, a maul with a defective handle, caused injury to a fellow servant. The court held that the servant using the maul was under duty to know its condition by inspection. The injured servant, being under no duty and having no opportunity to inspect the tool, could recover. Here the master knew of the defect. The decision could better have been placed upon the master's original negligence in knowingly placing a dangerous tool in his servant's hands. The facts present an interesting complexity for discussion. The key to the problems suggested is that the knowledge of the defect on the master's part takes the case out of the doctrine of the simple tool, and makes it a straight case of negligence.

[50]With respect to simple tools, ordinarily the master is not relieved of responsibility because the servant assumed the risk, but the servant assumes the risk because the master is relieved of responsibility. What is more, the same circumstances which establish assumption of risk by the servant, show that there is no duty on the part of the master. Assumption of risk by the servant does not necessarily imply negligence on the part of the master.

[51]98 Miss. 750, 54 So. 252 (1911).

means of knowledge) has no application in case of such simple tools except where the defect in the tool is obvious or patent." Probably the distinguished judge should have omitted "in case of such simple tool" because here defects are usually obvious or presumably known.[52] Moreover, the doctrine applies only when there is not equal knowledge. This case however, contained suggested bases for the doctrine which were not clearly emphasized by the later decisions.

In *Wausau Lbr. Co. v. Cooley*[53] the tool in question was an ax—admittedly a simple tool. There was judgment for the appellant even though the master knew that the tool was defective, and had required the servant to use it. These factors, as well as the dicta in the *Parker* case, were ignored. Such a view seems to sanction the right of the master deliberately and without liability to compel a servant to use a defective simple tool. It ignored the fact that the doctrine involves only the master's immunity from inspection, not from liability. The decision seeks justification in the view that "the servant's knowledge and judgment in such case being equal to that of the master. . . ." It would seem just to the servant to reverse the reasoning and view the master's knowledge as equal to that of the servant, with consequent responsibility and liability.

In *Bear Creek Mill v. Fountain*[54] a chisel was involved. Neither master nor servant had actual knowledge of its defect. The decision was rested squarely on the Simple Tool Doctrine. Counsel all assumed that Sections 511 (comparative negligence) and 513 (abolishing the defense of assumption of risk) barred recovery and that contributory negligence could not be shown. The reasoning was that the Simple Tool Doctrine was based upon assumption of risk rather than on the absence of negligence by the master. There was not stressed that which should be recognized, namely, that assumption of risk merely characterizes the status of the plaintiff as a result of a finding of non-negligence by the master. The plaintiff's burden was to show negligence by the defendant; but the master marched triumphantly to victory under the aegis of the Simple Tool. So that the issue as usual was not negligence *vel non* of the master, but simply *vel non* as to the tool. It should be added that the result reached was correct under either theory.

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[52]This inexactitude may be explained by the court's dependence upon LABATT, MASTER AND SERVANT (1904) §§ 405, 407. But here the text writer was not discussing simple tools but appliances generally.

[53]130 Miss. 333, 94 So. 228 (1922). The court again cited the definition of 'respondeat superior' referred to above in note 31, *supra*.

[54]130 Miss. 436, 94 So. 230 (1922).

Allen Gravel Co. v. Yarbrough[55] is perhaps the most interesting of cases on this subject. A wrench was held to be a simple tool. Section 513 was held not to apply to such tool "because the master is not negligent as to them." This was deemed a safe generalization, unfortunately making inconsequential such factors as (1) the tool was defective; (2) both knew of the defect. The decision overrode the argument of plaintiff's counsel that there was no magic in a simple tool that immunized the master against all duty or liability with respect thereto. There would seem to be no reason to allow a master knowingly to furnish a defective tool of any kind. The test should not be its simplicity, but its potentialities for injury. Nothing is more simple in construction than a bullet, a capsule, a hole, or a plank.[56] Certainly the requirement of due care should be effective to restrain the deliberate furnishing of any device known to be unsafe or dangerous.

In a persuasive dissent[57] it was urged that the doctrine rests upon the doctrine of assumption of risk, and since the latter had been abolished, the former should have fallen with it. This overlooks that Section 513 did not abolish such traits of negligence as are inferable from a voluntary exposure to known dangers, but only the defense of assumption of risk. The dissent reveals that the master knew of the defect, and reasoned that the doctrine does not relieve the master of all care but only of the duty to inspect for obvious defects.[58] Indeed the doctrine requires no inspection at all. Yet the opinion stresses the real basis for the doctrine and would seem to forecast some future attack on the *Cooley* and *Fountain* cases.[59] While the master need not search out defects, he may not ignore them when known to him.

This is the chief reason why these cases ought to be overruled. For here the master's negligence should have been seen as an issue, and assumption of risk was not available. The majority opinion held that "the rule (assumption of risk) existing prior to the statute (Sec. 513) in this state remains in force because there is

[55]133 Miss. 652, 98 So. 117 (1923).

[56]The student may find interest in examining the Cold Sunday Case [Yazoo City *etc.*, Co. v. Smith, 78 Miss. 140, 28 So. 807 (1900)] where the injury resulted solely from the weather. The court intimated that the servant knew more than any one about the effect of exposure to cold. Regardless of how the case would be decided today, it at least places non-liability upon the superior knowledge of the servant, and invented no theory applicable solely to the means whereby the injury was produced.

[57]By Smith, C. J. The majority opinion was impliedly criticized in Maher v. Wagner, 62 S. D. 227, 252 N. W. 647 (1934).

[58]*Cf.* Tampa Shipbuilding Co. v. Thomas, 179 So. 705 (Fla. 1938) where it was to be the duty of the servant to inspect all tools for patent defects. See notes 36 *supra* and 67 *infra*.

[59]Such in fact was the view expressed in the dissent.

no negligence on the part of the master to bring the case within the statute." This appears to beg the question of the master's negligence. It is thought that, since there is an issue of negligence because of the master's knowledge of the defect, Section 513 should be effective to forbid the defense of assumption of risk.

The Effect of Section 513

It may be questioned whether Section 513 removed the basic principles of the Simple Tool Doctrine, as was intimated in the foregoing dissent. For such basis is not assumption of risk, but the absence of duty on the master's part to inspect. If there were no defect, or a defect known only to the servant, Section 513 would not be applicable, and to say that the servant assumed the risk would be merely to state that the master is not negligent. The doctrine did not rest upon assumption of risk, but resulted in it. Since the master has not failed to use due care the situation is thus: the master is not relieved of responsibility because of the servant's assumption of risk; rather the servant assumed the risk because the master has met his responsibility.[60] If a defect were known to the master, not only is the basis of the doctrine removed but the doctrine itself is removed. So that Section 513 did not destroy the doctrine, as laudable a purpose and result as that would have been.[61] The section comes into play only when the master is negligent, and such is not the case unless he has actual knowledge of the defect.

Laurel Mills v. Ward[62] was decided upon the principle that a ladder, used by the servant, and as to whose defects complaint had been made, was a part of the place of work. It would not be in point here except for the views expressed in the dissenting opinion,[63] which held that the ladder was a simple tool or appliance and that the master should have been exonerated "on the ground that the master can be guilty of no negligence in furnishing a simple defective tool." This view ignores the possibility that the master's knowledge of the defect might raise an issue of negligence. The opinion would rest his non-liability solely upon the circumstance that the ladder was a simple tool. It was further said that "a servant using a ladder in the course of his usual employment is chargeable equally with the master with knowledge of its obvious

[60]The servant still assumes risks remaining after the master has used due care. Wilbe Lbr. Co. v. Calhoun, 163 Miss. 80, 140 So. 680 (1932).

[61]This reasoning is consistent with the doctrine if retained. The writer believes, however, that it should be abolished.

[62]134 Miss. 447, 99 So. 11 (1924).

[63]By the learned Justice who wrote the opinions in the Cooley and Fountain cases.

imperfections." Yet it is the rationale of the doctrine thus invoked that it does not charge the master with any knowledge of its condition. Its peculiar function is to charge the servant alone with such knowledge.

In *Jones v. Southern United Ice Co.*[64] the ice-tongs involved were held to be simple tools. There had been complaint of a defect and an assurance of safety by the master. Here, too, the court affirmed a dismissal which had been entered by the trial court on the ground that the servant's knowledge was equal to the master's. This may be a basis for applying the doctrine of assumption of risk but not of the simple tool. As in the *Yarbrough* case, to invoke assumption of risk in the face of Section 513 is conclusively to assume that the master's knowledge of the defect in a simple tool could never amount to negligence. The most appropriate criticism of this case, however, is that the Simple Tool Doctrine does not apply, since the assumed ignorance of the master is rebutted by his actual knowledge gained through the servant's complaint. Moreover the case involved the principle of assurance of safety.

In *Middleton v. Faulkner*[65] the plaintiff was held to be inexperienced and unable to appreciate the dangers in the use of a defective simple tool—a wedge. There was an assurance of safety by the master, and the decision was referred to principles other than the Simple Tool Doctrine. The decision reaffirms that an important element of the doctrine is the presumption of knowledge by the servant of the condition of such tool. This factor was eliminated by his inexperience, and the case was resolved into a general negligence case. It emphasizes the necessity and propriety of restricting the application of the Simple Tool Doctrine to cases where the servant knows and the master does not. So that when the master's immunity from any duty to inspect is destroyed by actual knowledge, the doctrine is likewise destroyed. Here, too, the tool is no longer "simple" because of the inexperience of the servant, and the principle is no longer different from a case where, instead of a diminished appreciation of the servant, there is an increased complexity of the appliance.

In *Middleton v. National Box Co.*[66] the court, in discussing the relation between the doctrine and Section 513, said:

> "The statute does not impliedly abrogate the simple tool doctrine. The rule in Mississippi is that the simple tool

[64] 167 Miss. 886, 150 So. 652 (1933).
[65] 180 Miss. 737, 178 So. 583 (1938).
[66] 38 F. (2d) 89 (S. D. Miss. 1930).

> doctrine is not based merely on assumption of risk and contributory negligence, but has an additional fundamental basis for its existence, presumably the public policy of not holding the master to the duty of using reasonable care to furnish a safe tool of a common and simple nature."

The quotation presents a view not inconsistent with former decisions of our court, yet is interesting especially in two particulars. It fosters a better understanding of the effect of the statute and correctly disassociates the doctrine and the statute. Next, it follows the usual expression of the courts in basing the master's immunity upon an absence of duty to use reasonable care to furnish reasonably safe tools, rather than in relating the doctrine to a rule of evidence whereby the supplying of a simple tool to an understanding servant is deemed compliance with such duty. Instead of basing a rule of substantive law upon public policy, the court could reasonably have derived a rule of evidence from the policy of courts and juries to consider the master's conduct in supplying a simple tool to one who has reasonable prudence, as a compliance with his duty to use reasonable care.[67]

Finally, it may be readily shown that the doctrine is not derived from assumption of risk or contributory negligence by calling attention to the Workmen's Compensation Acts and other statutes which deny both defenses to an employer who fails to comply with the Act. Under such circumstances the master may still invoke the Simple Tool Doctrine.[68]

Summary

I. The Simple Tool Doctrine should be abolished and the cases sustaining it overruled.

II. Even though the doctrine is to be preserved it should not be extended to cases where a servant is injured by a defect of which the master had actual knowledge.

III. The doctrine being based on the master's immunity from inspection, it should never be invoked as a rule of substantive law to absolve the master from the obligation which knowledge of a defect imposes.

IV. The reasoning of the courts should not begin with the tool to judge whether there is any duty, but should begin with the duty and adjudge whether it has been complied with.

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[67]An adult servant presumed to have sufficient knowledge to operate simple tools. THOMPSON, NEGLIGENCE (2d ed. 1901) § 4660.

[68]Maher v. Wagner, 62 S. D. 227, 252 N. W. 647 (1934).

III. The Master's Promise To Repair

Ofttimes upon the surface of foundations freshly laid there fall alien substances which, impressed into its surface and unmolested, come to be identified as integral therewith. We may with interest examine whether this figure may include the promise by the master to repair a defective tool or appliance.

Under the influence of the doctrine of assumption of risk, knowledge by a servant of the defect in an appliance was originally held a bar to his recovery against the master for injury therefrom. Knowledge by the master was almost immaterial in view of the disabling effect of the servant's knowledge. Yet this effect, through such bizarre reasoning as kept assumption of risk alive, was in some way suspended whenever the master's knowledge was procured through a complaint by the servant eventuating in the master's promise to remedy the defect.

The effect of the master's promise to repair or replace, simply stated, was temporarily to suspend the operation of the theory of the servant's assumption of risk. Since the promise, likewise involved a complaint or report by the servant, the subject can be treated as dealing with cases where there is a defect known and appreciated by both the master and the servant.[69]

In spite of attempted distinctions between assumption of risk and contributory negligence, it is significant that the promise to repair must necessarily imply defects which, without repair, would create unreasonable dangers. The doctrine concerned not efficiency but safety. Such defect, therefore, was abnormal and bespoke negligence. This is attested by the decisions which forbid an extension of the rule to cases where the servant demands a safer or more efficient substitute for a tool which, in spite of some imperfections, is nevertheless reasonably safe.[70]

The rationale of this doctrine is obscured by the same opaque haze which is characteristic of assumption of risk. The latter did not deal with the factor of the master's knowledge, or his conduct judged in the light thereof. The principle of the Doctrine of Promise to Repair operated chiefly to lift this mantle of responsibility from the shoulders of the servant. Yet the devotees of the doctrine, unwilling that assumption of risk should be completely

[69]*Cf.* Reynolds-West Lbr. Co. v. Taylor, 23 F. (2d) 36 (C. C. A. 5th, 1927) where it was held that failure of a servant to avoid a known risk or danger was negligence. The servant also must use due care. Hope v. Natchez *etc.*, Ry., 98 Miss. 822, 54 So. 369 (1911).

[70]Jones v. Y. & M. V. Ry., 90 Miss. 547, 43 So. 813 (1907); Labatt, Master and Servant (1904) 3909.

discarded, draped it about the shoulders of the master.[71] Wherefore, by promising to repair the defect the master was considered to have 're-assumed the risk'.[72]

Since neither contributory negligence nor assumption of risk invited any scrutiny of the master's conduct or the effect of his knowledge, so the promise to repair, by suspending the servant's assumption of risk, took as little note of the servant's conduct thereafter as had been taken of the master's theretofore.

The rule as to the effect of the master's promise has been so generally applied that it would in some quarters be deemed presumptuous to assail it. Yet I invite a re-examination of its asserted rationale, not only with a view to testing its logic, but also to assessing its value in the light of our statute abolishing the defense of assumption of risk.[73]

The rule recognized the doctrine of assumption of risk as involving the maxim *volenti non fit injuria*, and accordingly emphasized the voluntary character of the servant's exposure to (assumption of) a known risk. The servant's complaint was held to exhibit a degree of protest that was inconsistent with volition.

Strange to say, the master's liability for an injury to a servant subsequent to the promise was not based so much upon the master's knowledge, but rather upon the immunity of the servant to the arbitrary bar of assumption of risk. Since the master should never be held liable except for negligence, this should ever have been its avowed basis. It was as illogical to base the master's liability upon a "re-assumption of risk" as it was originally to have designated the master's defense as assumption of risk. In the latter case the risk assumed was of injury; in the former it was of liability. The mere fact that an employer always runs the risk of liability when he fails to exercise reasonable care for his employee, should have been a simple and sufficient basis. There was no justification for inventing the doctrine of Promise to Repair as a rule of substantive law and investing it with canonical dignity and permanence. As much may be said of the servant's risk of injury from his own failure to exercise reasonable care.

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[71]Even the RESTATEMENT, AGENCY (1933) § 533 clings to assumption of risk. Yet it is not an assumption of the risk of injury, but of liability. It would seem that the master always assumes the risk (of liability) due to his own negligence.

[72]See LABATT, MASTER AND SERVANT (1904) 3909. The nomenclature of assumption of risk is characteristically loose. To designate the master's responsibility as a re-assumption of risk, is to presuppose a previous assumption by him. This is unsound, unless one has in mind the consideration mentioned in the last sentence of the preceding note.

[73]MISS. CODE ANN. (1930) § 513.

Pending the making of necessary repairs, the master was said to "assume the risk". This, too, in spite of the fact that the servant, fully aware of the defect and protesting its danger, continued to use such appliance.

Let us eliminate as factors the master's assurance of safety,[74] or his assurance that the appliance has been repaired; or the servant's temporary forgetfulness of the defect.[75] Let our discussion be concerned solely with a re-examination of the effect of the knowledge of the master and of the servant respectively of the existing defect.

Ordinarily under the common law, knowledge by the servant with or without knowledge by the master barred the servant under the doctrine of assumption of risk. The doctrine of the Promise to Repair was based by the courts upon various theories. By some the master's promise was invested with somewhat the force and effect of a direct order, thus relieving the servant of the burden of *volenti non fit injuria,* except in extreme cases where no prudent servant would have obeyed the order. Elsewhere the promise assumed the aspect of an assurance that the appliance was suitable and safe. Again, the doctrine was considered to transfer the risk to the master, since the continued use of the appliance by the servant was for the master's benefit and at his wish.[76] There were other bases suggested, none of which seemed to take into account the simple fact that there was furnished a tool the defects in which were known by both parties.

It would seem that if the rule were logical, it would be immaterial whether the master had such knowledge, or how he procured it. Yet consistency may not be expected of an inconsistent doctrine. So that if it chanced that the master's knowledge was procured from a complaint or report of the servant, it was held to assume a distinctive aspect. Further, if the master promised to remedy the defect, the servant could continue to expose himself to the same danger without assuming the risk of "assumption of risk".[77] How the danger was thereby decreased or the conduct of the servant made less culpable is not made clear by the decisions. He still assumed the risk, in a popular sense. The phrase was still apt but had lost its vigor as a rule of law.

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[74]THOMPSON, NEGLIGENCE (2d ed. 1901) § 4664.

[75]Sea Food Co. v. Alves, 117 Miss. 1, 77 So. 857 (1917); Standard Oil Co. v. Decell, 175 Miss. 251, 166 So. 379 (1936).

[76]Schlitz v. Pabst Brewing Co., 57 Minn. 303, 59 N. W. 188 (1894); T. & O. Ry. v. Bingle, 9 Tex. Civ. App. 322, 29 S. W. 674 (1895).

[77]Of course if the danger was still so obvious or imminent that a reasonably prudent man would not incur the risk, contributory negligence could be pleaded.

It is interesting to speculate why the personal promise to repair created a higher duty than the pre-existent duty to maintain such appliances in reasonable repair.[78] It is fitting to say that the situation produced by the promise to repair was equitable, though almost inadvertently so. It was at least an antidote for the poison of assumption of risk and for the conclusive effect of the servant's knowledge. Here two wrongs seemed to have made right by neutralizing each other. The master's responsibility was left where it should always have remained.

Full play was now given to the knowledge of the master, and responsibility was now fixed upon him. The resultant of these forces of reasoning was happily some measure of ultimate justice. The bases, however, upon which the liability of the respective parties rested must not have been substantial, for they were readily and effectively shifted back and forth by a word: the servant's "report", and the master's "promise". So long as *facts* were not thereby changed they should have been respected as more stable foundations. The criticism of this procedural anomaly is twofold: (1) it placed the master's liability upon an illogical and irrational basis whereas it could have, by eliminating the defense of assumption of risk, referred the servant's right of recovery to the master's failure of fundamental duty; (2) it gave the servant too great an immunity. His conduct should have been left subject to appraisal as contributory and comparative negligence.

The rule was so interwoven with the doctrine of assumption of risk that this shibboleth of immunity could be bandied about between master and servant in accordance with certain set formalities. As an instance, upon expiration of the period set for repairs (or within a "reasonable time" if the period was indefinite) the servant "re-reassumed the risk". Once this blight of exclusive responsibility settled upon one of the parties attention was effectively distracted from the conduct of responsibility of the other.[79]

We shall not rehearse at length or exhaustively the suggested incidents of the doctrine. Among these are the requirements that: (1) the resultant injury must have been due to the defect complained of; (2) the servant's continuance at work must be in reliance upon the promise; (3) the injury must occur within the time promised, or in a reasonable time.[80]

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[78]See note 85 *infra*, and text.

[79]Naturally there were exceptions in extreme cases, as where the servant's conduct was "recklessly negligent" or his conduct was such an immediate and controlling factor as to become legally the sole proximate cause of his injury.

[80]Andrecosic v. N. J. Tube Co., 73 N. J. L. 664, 63 Atl. 719 (1906).

The promise "negatives the inference of (the servant's) willingness to incur the risk",[81] is the way one court puts it. To the courts which view the terms of employment as including the servant's "contract" to assume ordinary risks, the master's promise to repair is seen as an "agreement" by the master superseding the original "contract".[82] The fact that any defect deserving of repair was not an "ordinary risk" did not prevent the courts from building precedent upon this foundation.

Much confusion has arisen by a failure to relate the servant's right to recovery in proper cases to the master's assurance of safety, as above adverted to, or other factors affecting or destroying the servant's appreciation of the defect (and hence of his risk).[83] If these elements are eliminated, we see that the master's mere promise effects no repairs, and decreases not at all the danger. Even the Promise to Repair Doctrine permitted the master to resume his defensive shield of assumption of risk once the time allotted for repair had elapsed. A servant, aware of the defect, should have been compelled to regulate his conduct with regard to the known danger, and without regard to whether it had been complained of.

When a definite promise to repair has been made and the time therefor has elapsed without compliance, the servant is again held to have assumed the risk if he knows the repairs have not been made. In what respect is his conduct, prior to the expiration of such time, different or productive of different results? Certainly if his knowledge in the interim has not been neutralized by any assurance of safety or temporary forgetfulness, the rule should be the same.[84]

Whether the repairs were to be made within a definitely promised time or within a reasonable time, furnished material for text writers and courts addicted to legal rules of thumb, especially when

[81]Dowd v. Erie Ry., 70 N. J. L. 645, 57 Atl. 248 (1904). It should be borne in mind that the servant was never willing to incur injury. Properly analyzed, he was prepared (willing) to incur the risk of injury rather than the risk of losing his job; hence he never willingly assumed the risk. There was always this compulsion.

[82]A clear discussion of the so-called "contract theory" and of the servant's duty is found in Gulf R. R. v. Benford, 79 Tex. 619, 15 S. W. 561 (1891).

[83]Among other special factors which have delayed a definite enunciation of the rule, is the fact of insistence by the master upon its continued use. Assurance of safety and mistake as to whether the repairs have been made, all affect the controlling elements of knowledge and appreciation.

[84]Compare the effect of a pardon as affecting the disqualifying effect of the original crime and conviction. Mental or moral traits are conditions and not theories. See 28 R. C. L. *Witnesses*, § 212; Rittenberg v. Smith, 214 Mass. 343, 181 N. E. 989 (1913).

their logic was secreted in pompous latin phrases. Even when expressed in plain English, the phrase "I'll fix it", is translatable by common sense to mean "Until I do so it still needs fixing." The promise operates in the future; the servant in the present. Promises do not weld broken tools. The classic example of minimum repair effort is embodied in the colloquialism—a lick and a promise. Even the boldest promise unaccompanied by a lick or two never repaired any defect or lessened any danger.[85]

The report of the servant and the promise of the master should not have been disguised in mock finery but left to run unobtrusively at large, frankly identified merely as evidential factors readily available to any who requisitioned their services to establish the fact of knowledge and consequent negligence.[86]

Some cases hold that the breach of the promise to repair must have been the proximate cause of the injury. The writer can but feel that the duty is thus poorly expressed. The proximate cause must always be the breach of *duty* (negligence) to use reasonable care to furnish reasonably safe tools. There could seem to be no reason why the master's promise created any higher or different duty than that which had theretofore existed. The master's liability arises not from the broken promise, but from the broken appliance.

Some states have a statutory requirement that the servant must report any defect to the master or be adjudged to have assumed the risk. Such statutes crystallize into substantive law what undoubtedly should have been the dictate of common sense and justice, and which all along should have been potent evidential factors in fixing negligence and liability. That is, the servant's knowledge should have furnished a basis for his (contributory) negligence, even as his complaint to the master should, by changing the character of the master's knowledge from constructive to actual, have evidenced his negligence.

Neither common sense nor common honesty ought to recognize a servant's right knowingly to expose himself to a defect with no obligation to interest himself in its repair, either by himself or the master.[87] Except where defects become suddenly patent with-

[85]See note 78 *supra*, and text.

[86]Evans v. Central of Ga. R. R., 36 Ga. App. 146, 142 S. E. 909 (1928); Moore v. Isenman, 127 Me. 370, 143 Atl. 462 (1928); Edwards v. Morehouse Stave & Mfg. Co., 221 S. W. 744 (Mo. App. 1920); Ashley v. Tri-State Lbr. Co., 79 W. Va. 726, 91 S. E. 813 (1917).

[87]Such interest is not to repair it of course, but to ascertain whether it has been done; and in the meantime to use reasonable care in the light of his information. Mining Co. v. Fullerton, 69 Fed. 923 (C. C. A. 8th, 1895); Gibson

out reasonable time to charge the master with knowledge,[88] the master has actual or constructive knowledge of patent defects. So that in most cases where the servant exposes himself to a known danger, both the servant and the master are negligent.

Such statutes evidence a regard for the "contract theory" of assumption of risk, and are designed to eliminate such bar by excising the fiction of the servant's consent. Thereafter the applicable formula could appropriately be "*volenti fit injuria*". However, they did operate to restore a just balance of responsibility by removing the servant's knowledge as an arbitrary basis of the master's immunity, while retaining the conduct of the servant as an evidential circumstance.

Suffice to add, however, that logically there should have been no distinction between the effect of a report by the servant on the one hand and a promise of repair by the master on the other.[89] Both imply knowledge by both parties.[90] Except in a few limited aspects[91] the promise to repair presupposes a knowledge and complaint by the servant. Yet a body of rules clustered like barnacles about this doctrine prevent its use by the servant save when the promise was the inducement to continue on the job.[92]

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v. Ry., 55 Minn. 177, 56 N. W. 686 (1893); Hope v. Natchez Ry., 98 Miss. 822, 54 So. 369 (1911).

[88]Lumber Co. v. Fairchild, 155 Miss. 271, 124 So. 336 (1929).

[89]Under the statutes requiring reports of defects, promise to repair need not be shown. In discussing the effect of the promise the courts have invented various theories. "The promise", said the court in Dowd v. Erie R. R., 70 N. J. L. 455, 57 Atl. 248 (1904) "negatives the inference of willingness to incur the risk." The consent of the servant was ever a popular fiction. The citation illustrates another cause of confusion, even in following through with the theories of assumption of risk. For it is not the master's promise, but rather the servant's complaint which erases "*volenti*" from the maxim "*volenti non fit injuria*". The fact of the defect and knowledge thereof seems underemphasized in Seaboard Ry. v. Horton, 233 U. S. 595 (1913) where it was held that when there was a promise to repair "the employee relying upon the promise does not assume the risk, unless at least the danger be so imminent that no ordinary prudent man under the circumstances *would rely upon the promise.*" Why, instead of the italicized phrase, should the court not have said "would continue to expose himself to such danger"?

[90]This ought always to be the test. *Cf.* Reynolds-West Lbr. Co. v. Taylor, 23 F. (2d) 36 (C. C. A. 5th, 1927), where a servant's failure to avoid a known danger was frankly denominated contributory negligence.

[91]For example, where the master's promise to repair amounts to an assurance of safety, or otherwise affects the fact or degree of the servant's knowledge.

[92]Wood v. Dana, 230 Mass. 587, 120 N. E. 159 (1918); Harmon v. Rockwood Sprinkler Co., 88 N. J. L. 564, 97 Atl. 730 (1916); LABATT, MASTER AND SERVANT (1904) §§ 418-432.

The Effect of Section 513, Code of 1930

With assumption of risk definitely removed as a defense by Section 513 of our Code, we need not resort to nor further analyze these several formulas.

The basis of the doctrine of the master's promise to repair was always assumption of risk. Since Section 513 abolished the latter as a defense when the master is negligent, and since the master is usually negligent when there is a defect that should be repaired, it is clear that our statute should be held to have abolished the doctrine of Promise to Repair. If the master is not negligent, then it does not matter whether the servant's conduct is styled assumption of risk or not. And since the promise to repair a tool whose defect does not imply negligence does not increase the master's responsibility, Section 513 makes inappropriate the invocation of the Promise to Repair Doctrine except as an evidential factor.[93]

An interesting combination of theories is seen when the promise to repair refers to "simple tools".[94] Pains to differentiate between tools should not have been suffered since the effect of the "simple tool doctrine" was to free the master from any duty to inspect (gain knowledge), and when there is a promise to repair, this very revelation of the master's actual knowledge destroys the basis of the simple tool theory. The two doctrines can not stand together. Here again the presence or absence of knowledge is the diagnostic mark of each respectively.

It is the writer's view that the husks of both "doctrines" should be torn away and the kernels of *knowledge* alone retained as an element tending to establish negligence by either or both.[95]

The Mississippi Cases

This brings us finally to the attitude of our own court, which still may be found to have a sentimental regard for the "doctrine".

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[93]In a former article (1939) 11 MISS. L. J. 290, the writer disparaged the practical value of Section 513. The view in the text above is not inconsistent, since it is still held that Section 511 of Mississippi Code of 1930 (abolishing contributory negligence as a bar, and enacting the comparative rule) would destroy the doctrine of promise to repair by referring the negligence and responsibility of each to his respective knowledge. So stated, Section 513 abolished whatever assumption of risk was, or whatever students or court could find to have remained after the enactment of the prior statute, Section 511.

[94]See notes (1929) 61 A. L. R. 903; (1912) 40 L. R. A. (N. S.) 837.

[95]Thus under our Comparative Negligence Statute, Section 511, the facts may safely be left to fix and adjust all degrees of responsibility ranging from 0% to 100% on the part of either.

In *Mississippi Utilities Co. v. Smith*,[96] the master had been notified of the dangerous and defective condition several days before and had promised to remedy it. The servant did not know at the time he was injured that the truck had not been repaired, but relied on the promise. The court said,

> "There could be no assumption of risk by him (servant) because of the knowledge of the master of such defective condition, his *promise to have it repaired,* and appellee's reliance upon that promise." (Italics supplied).

Let us examine the reasons assigned by the court for its ruling. The first obviously views the master's conduct as negligence whereby, under Section 513, he is denied recourse to the defense of assumption of risk. This implies that the master's conduct in knowingly suffering a defective condition to remain is negligence. Wherefore the second reason given by the court (the promise to repair) need not be, and is not, the basis of liability. Nor need such basis have been suggested, since the first basis showed the master's knowledge. The third reason would be appropriate only upon the assumption that the master's promise had lulled the servant into a false sense of security (the assurance of safety theory), or that the servant's knowledge of the condition had been abated or affected by an assumption that there was no longer any defect. This merely neutralizes the inculpating effect of the servant's original knowledge, by the substitution of an assurance of safety. The court discussed Section 513, but without intimation that the Section, by destroying assumption of risk as a defense, had likewise destroyed its off-spring, the "promise to repair" doctrine.

In *Texas Co. v. Jackson*,[97] there was an injury to a servant through a defective steering wheel of a truck. Both knew of the defect and the danger. The court said,

> "Under Section 513, Code of 1930, the appellee did not assume the risk of driving the truck with knowledge of the defect in the steering wheel thereof, particularly when his employer . . . . had *promised to repair it.*" (Italics supplied).

It was not suggested that if the master was negligent in suffering a dangerous condition to exist, the servant would be likewise contributorily negligent in exposing himself voluntarily thereto. Many of our cases dispose of assumption of risk, as descriptive of the servant's conduct, by reference to Section 513. It should be kept in mind however, that this Section did not abolish the fact that

[96]166 Miss. 105, 145 So. 896 (1933).
[97]174 Miss. 737, 755, 165 So. 546, 552 (1936).

many employees negligently take chances (assume risk), and are thereby contributorily negligent; it only abolished the doctrine as a legal defense. The laws of human nature and common sense can not be repealed. Hence it seems clear that reference to a promise to repair is not in point, since this fact only throws light on the question of the master's knowledge of the defective condition. The promise did not create liability, nor was it needed to negative the servant's assumption of risk; the quoted statute was held to have done that.

In *Pearl River Valley R. R. v. Moody*,[98] the fact of a promise to repair runs through the opinion. Yet this is a case arising under the Federal Employer's Liability Act, under which the doctrine of assumption of risk is recognized. The very fact that the rule as to promise to repair is appropriate where the defense of assumption of risk is recognized, emphasizes that the contrary is true where the latter is denied.

Ross v. L. & N. R. R.[99] is decided under the federal statute. The promise to repair was a controling factor. We are reconciled to the recognition of the Promise to Repair Doctrine wherever its accomplice, assumption of risk, is allowed to run at large.

In *Aponaug Mfg. Co. v. Carroll*,[100] both doctrines were urged and discussed; even the question as to what would be a reasonable time to allow for fulfilment of the promise. It was at no time attacked. Nor did the court repudiate the contention that the plaintiff assumed the risk between the time of the promise and of the injury. If assumption of risk applied, it would mean that the master was not negligent. If it did not apply, it would be because the master was negligent. Hence the promise to repair meant nothing, unless it substantiated the fact of the master's knowledge of the defect and his recognition of its need for repair (implying negligence).

In many of the cases cited under Section II of this series, there were promises to repair. The fact that they were held to affect only the quality, extent, or effect of the servant's knowledge (as for example, inducing a sense of security) prevented their consideration squarely as examples of the Promise to Repair Doctrine.

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[98]178 Miss. 1, 171 So. 769 (1937).
[99]178 Miss. 69, 172 So. 752 (1937).
[100]184 So. 64 (Miss. 1938).

Summary

The Promise to Repair Doctrine was an invention suspending the defense of assumption of risk against the servant's action for injuries.

As such, (1) it is cumbersome and illogical and ought to be abandoned; (2) it should be deemed abolished along with assumption of risk, in view of Section 513, Code of 1930; (3) the phrase should have no significance in law other than as an evidential factor affecting quality, extent and effect of the knowledge of the master, or the servant, or both.[101]

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[101]A more reasonable attitude is forecast by many of the decisions. Among these are: Counsel v. Hall, 145 Mass. 468, 14 N. E. 530 (1888) (the promise is only a circumstance to be considered by the jury in determining whether the servant used due care in the light of his knowledge); Jones v. New America File Co., 21 R. I. 127, 42 Atl. 509 (1898) (even after the promise to repair, the question of assumption of risk is a jury issue); Harris v. Bolton, 81 Vt. 346, 70 Atl. 560 (1908) (after promise to repair, the due care of the servant still an issue). The promise to repair creates no absolute right of recovery if servant is negligent as a matter of law. Belleville Stone Co. v. Mooney, 60 N. J. L. 323, 38 Atl. 835 (1897) (if the risks incurred after the promise are incidental to the employment the servant still assumes the risk). In seeking to support the doctrine one text writer cites numerous cases purporting to uphold the doctrine that the promise lifts the burden of assumption of risk. BAILEY, PERSONAL INJURIES (2nd ed. 1897) § 1279. Yet, upon examination, these prove to be cases where assumption of risk was not involved, notwithstanding the promise to repair. Many also are under the Federal Employers Liability Statute.

LABATT, MASTER AND SERVANT (1904) 1206 concedes that if the servant's conduct is negligent in law, the only effect of the promise to repair should be to make such negligence a jury question. See also cases cited in note 17, *supra*.

CRIMINAL BREACH OF TRUST AND CORPORATE MISMANAGEMENT—PART III.

Orvill C. Snyder

e'. Summary

If in any given case, it is judicially determined, after leaving an ample margin for honest differences of opinion (which by the way is a matter for judicial decision, not directoral assertion), that, with respect to a dividend on watered stock, the recipients had no claim to receive it either in whole or in part; that other stockholders or creditors, or both, had claims that it should not be paid either in whole or in part; and that, consequently, the directors had no authority to declare and pay it either in whole or in part—then the act of declaring and paying the dividend is a diminution of corporate assets (either as to the whole dividend or as to the excess), by paying out to those not entitled in such wise that the claims of beneficial owners have been infringed. The act, therefore, works an actual corporate loss in the sense in which loss is regarded in fraudulent conversion. There can be little doubt that such a case would present points difficult of decision; but the courts have in their development of the element of fraudulent intent forged an adequate instrument for making the decisions. As we have seen,[243] in the doubtful case, the aspect for which search is made is personal gain to the fiduciary. If the directors issuing the watered stock and paying the dividend thereon are the same, and if they have gained personally to a substantial extent, the case should be sent to the jury under the ordinary and well-established rules respecting intent to defraud. If the directors declaring and paying the dividend are not the same as those issuing the stock, inquiry must be made as to whether or not they knew the stock was watered. If they did have this knowledge, or notice sufficient to lead reasonable men to knowledge, and yet declared and paid the dividend with substantial benefit to themselves and without taking proper measures (and what are proper measures in any situation is a subject for judicial definition in the jury

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[243]People v. Fleming, 17 P. (2d) 1042 (Cal. App. 1932), *rehearing denied* 220 Cal. 601, 32 P. (2d) 593 (1934); State v. MacCullough, 115 Conn. 306, 161 Atl. 512 (1932); Commonwealth v. Moore, 166 Mass. 513, 44 N. E. 612 (1896); People v. Meadows, 199 N. Y. 1, 92 N. E. 128 (1896); People v. Shears, 158 App. Div. 577, 143 N. Y. S. 861 (1913); *aff'd*, 209 N. Y. 610, 163 N. E. 1129 (1913); Hitchcock v. State, 47 Ohio App. 90, 190 N. E. 773 (1933); State *ex rel.* v. Gilbert, 213 Wis. 196, 251 N. W. 478 (1933).

See also Morrisey v. United States, 67 F. (2d) 267 (C. C. A. 9th, 1933), *rehearing denied* 70 F. (2d) 729 (C. C. A. 9th, 1934); House v. United States, 78 F. (2d) 296 (C. C. A. 6th, 1935), *cert. denied* 296 U. S. 608 (1935); People v. Talbot, 22 P. (2d) 687 (Cal. App. 1933), 220 Cal. 3, 28 P. (2d) 1057 (1934).

charge) for the protection of the prejudiced stockholders and creditors against payment of corporate funds to those having only doubtful claims,[244] then there is no reason why the case against them too should not go to the jury under the ordinary rules respecting intent to defraud.[245]

C. After Alteration by Amendment of the Terms of a Class of Stock

Directors have vast powers to sluice corporate 'property' from some stockholders to others in the issuance of additional stock already authorized, by selling par stock below par, or by fixing the price for no-par stock, and even to sluice among creditors by creating secured claims of varying priorities.[246] We shall confine our attention to changing participations by alteration of the terms of issued stock through amendment to the articles, with particular reference to the power of a majority of stockholders to make such changes. Admitting that the state has the legislative power to confer power to amend on a corporation, when that power has actually been conferred, how must the majority exercise it? It seems certain that they cannot exercise the power to destroy "vested" rights; nor does it seem that a legislature has power to authorize them to do so.[247] By "vested rights" are meant, as nearly as can be made out, defined claims with respect to 'property' already acquired by the corporation. Rights not "vested", and hence subject to change, relate to prospective corporate accumulations.[248] Another limitation on the exercise of the power to amend is a necessary inference from corporate relations which are judicially well-established. This limitation is that the power to amend, like any other power, must be exercised in good faith and without fraud. The conclusion flows from the rules that the majority are fiduciaries.[249]

In applying the conception of fraudulent conversion to problems of amendment, we shall take the instance of paying out a dividend on common stock, after the terms of a preferred issue have been altered by majority vote to enable that payment to be made. The situation, more concretely, is thus: A corporation has an issue of cumulative preferred. Earnings have been piled up for a number of years during which dividends on the preferred

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[244]See *supra*, note 212, and text appertaining.

[245]See *supra*, note 213, in regard to what is the act of conversion.

[246]BERLE AND MEANS, *op. cit. supra* note 23, c. 1, 2, and 3.

[247]One recent case is enough for present purposes to cover this subject: Keller v. Wilson & Co., Inc., 190 Atl. 115 (Sup. Ct. Del. 1936).

[248]Keller v. Wilson & Co., Inc., 190 Atl. 115 (Sup. Ct. Del. 1936).

[249]See *supra*, notes 23 and 24.

have not been paid. Unless payment of the accumulated dividends on the preferred can be avoided, the earnings must be paid out to the holders of that issue. The majority having voting power under the articles amend the articles so as to remove the claim of the preferred stockholders to the accumulations. Thereupon, one dividend is paid on the preferred and the bulk of the earnings is paid out as a dividend on the common. With respect to non-assenting preferred stockholders, could this be a fraudulent conversion of that part of the funds paid on the common which without the amendment would have gone to the preferred?

The first question is: Who had the requisite 'possession' and is within the usual terms of the embezzlement statutes? The funds paid out as dividends were in the 'possession' of the directors and, under them, of the officers. No corporate funds can be paid out unless an officer, having enough control over them to do the paying, acts. A resolution of the board authorizing this officer to make payment is, normally, necessary. There is no chance that payment will be made without involving the directors and some officer (or agent) having the requisite 'possession' of the funds. If the amendment is unlawful, the acts of these persons are not authorized thereby. Those who knowingly assist the directors and officers in paying out the dividends are aiders and abettors. If a majority of the stockholders cause the payment to be made through specially selected and innocent persons, they might themselves be held to come within embezzlement statutes embracing "trustees" or "other persons acting in a fiduciary capacity" and to have the requisite 'possession' in such capacity.

If those who are sufficiently in control of a corporation to get the stockholders, directors, and officers to pay a dividend under the circumstances mentioned, or are able to do the acts themselves, declare and pay out the dividend after alteration of the terms of a stock issue, what are the criteria by which to determine whether or not the payment is a fraudulent conversion? There is a diminution of the corporate assets. It seems a little imaginative to think that those procuring the payment would themselves gain no advantage thereby, as for instance, by receiving the dividend in whole or in part. There is a loss to the non-assenting preferred stockholders, *if* they have a legally defined expectation that the funds be used only to pay them their arrearages—or, what is the same thing as a legally defined expectation, a legal claim to such use of the funds. Since they do have such a claim with respect to accumulated net earnings withheld from the payment of cumulative

preferred dividends,[250] there is no reason why the dividend, sluiced to the common by means of the unlawful amendment, cannot be held to be a fraudulent conversion—an embezzlement or misapplication depending on the wording of the statute. The "vested rights" of the preferred stockholders to the accumulated earnings constitute perhaps, in such a case as this, the only claim infringed, which is sufficiently defined to justify application of the rules of the law of embezzlement. One other claim of the preferred stockholders is, however, to be noted.

The preferred stockholders have the claim that the terms of their stock shall not be altered by an exercise of the power of amendment made, not in good faith, but with an intent to defraud.[251] This principle of fraud is paid reverence in every adjudication upon the powers of corporate management. The courts have neglected to use it in cases of amendment; but it is applicable. In most cases, the contention of some "business exigency" can be made for the exercise of the power of amendment. Internal management is committed to the discretion of the directors, officers, and to the majority of the stockholders. Only in the clearest instances of abuse can courts interfere. By what signs can abuse be detected? The basic principle is that the power is to be used for the good of the corporation as a whole, and, in pursuit of this good of the corporation as a whole, some of the beneficial 'owners' may have to give way here and there. But the good of the corporation as a whole may be, and often is, undefined. It certainly is not the same kind of good as is the case where the *principal* is a natural person. It is the good of *all* the beneficial owners. There may, however, be conflict among the different classes of beneficial owners.[252] Where, for instance, earnings have been accumulated in a time of doubt about the future and now, the future brightening, may with good reason be distributed, who can tell whether it is advantageous to the maintenance of the corporate

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[250]Keller v. Wilson & Co., Inc., 190 Atl. 115 (Sup. Ct. Del. 1936).

[251]See 11 FLETCHER, *op. cit. supra* note 12, c. 58, §§ 5151, 5152.

[252]This is often true. What is good for one class is bad for another, and *vice versa*. What is then good for the corporation as a whole, especially where all the conflicting classes have substantial interests? However, no tears need be shed over the predicament of those in control who have issued "securities" right and left and thereby have gotten themselves into this quandary. If they cannot make the interest of the corporation as a whole appear, they ought to shoulder the burden. And if, in this situation of doubt, they go ahead looking out for their own pockets, that burden ought to be heavy. They should not be permitted to take advantage of a confusion which they have created to obscure their own liability and their own duty not to put themselves ahead of those whose trust they have solicited. One of the big tasks in corporate regulation is the prevention of the issuance of conflicting classes of "securities".

business as a going concern for all of these earnings, or most of them, to be paid upon accumulated arrearages on preferred stock or for the articles to be amended and some of them distributed on the common? And if it is not unreasonable to let the common stockholders have some payment, how much should go to them? It seems like folly to propose that statutes be enacted which attempt to specify in advance what shall be done and how it shall be done. *The sluicing to the common can be questioned only for fraud and bad faith. But the indicia of fraud and bad faith are well known.* If the sluicing is done, it is a fair presumption that it is done by a powerful group in control of the management. The element of fairness in disclosing their actions can be inquired into; this is only the application of the judicially established principle of condemning secrecy in the conduct of fiduciaries.[253] If the advantage to the corporate business as a going concern is doubtful and the personal gain to the management disproportionately gross,[254] the courts can follow their own long approved device of regarding these facts as *prima facie* evidence of fraud which requires a sufficient explanation on the part of the management.[255] The courts have the instruments with which to define the claims of the stockholders; and there is a job which needs doing by their using these tools. The claims once defined, the protection of them is manifest.

In either of these instances, some fiduciary in 'possession' of corporate funds has paid out those funds. This act has been done without legal warrant. In the first instance, the "vested rights" of the preferred stockholders in the accumulated earnings, which the majority had *no* power to divest by *any* amendment, have been infringed. There is actual corporate loss in diminution of corporate assets in such wise as to infringe a duty owed by the corporation to the preferred stockholders. If those who caused the sluicing to be done were motivated by substantial personal gains, there is no reason why the case should not go to the jury under the ordinary rules on intent to defraud. In the second instance, if the power to amend is exercised fraudulently (and fraud must appear if it is exercised for personal gain), the claim (existing even if no "vested right" in the accumulated earnings) of the preferred stockholders that their expectations, although alterable, shall not be altered *for the personal gain of the directors, officers, or those in "control"*, has been infringed; and there has been corporate loss by diminution of corporate assets in such wise as to infringe that claim of the preferred stockholders.

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[253]See cases cited, *supra*, note 136.
[254]See cases cited, *supra*, notes 178, 243.
[255]See cases cited, *supra*, note 165.

5. Two Abuses in Life Insurance Management

The two abuses in the management of life insurance companies to which attention is directed are described at length in the Armstrong Report[256] and in Best's Insurance News.[257] A life insurance policyholder has, in general, the following claims: (1) Payment of the benefits stipulated in the policy. (2) Intelligent and conservative investment of his money to the accomplishment of the foregoing purpose. (3) Establishment of an adequate reserve against the day when inevitably the claim must be paid. We are concerned with depletion of reserves. One of the ways in which depletion is caused is by writing new insurance at too low premiums. The reserves of the higher premium policies are then taken in part to pay the benefits on the under-priced policies. Since the reserves are in effect trust funds, the procedure mentioned is really a payment of funds belonging to beneficiaries of the higher premium policies to other persons not entitled to them.[258] Managements of insurance companies have fallen into the practice of under-priced writing of insurance so as to make a big showing of new business.[259] If this practice is followed in order to continue the control of those doing it and to present an apparent justification for increase in their own compensation, as seems to be the case, it might, in gross instances, be regarded as misapplication for personal gain sufficient to amount to fraudulent conversion. Another way that reserves are depleted is by continuing in operation after insolvency.[260] After insolvency, no policyholder is entitled to lapse his policy and draw out the full surrender value in cash; each must take his proportionate share. But, when the operation of a company is continued after insolvency, the "smart" or fortunate policyholders are permitted to withdraw their surrender values in full thereby causing a greater loss to those who do not withdraw. The reason for continuing operations is that those in control want to preserve their jobs and continue to draw their salaries; and so they go on, probably hoping against hope that "something will turn up". Where an aggravated situation obtains, as it does when operations are continued for a year or more after it is unquestionably known that inescapable insolvency ex-

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[256]Note 102, *supra*.

[257]*Ibid.*

[258]Of course, the new policyholders too are injured by being sold policies improperly rated. But this injury, which is more like obtaining by false pretenses, does not justify the payment to them of the reserves of other policyholders.

[259]The Bible of Life Insurance (1922) cited note 102, *supra*.

[260]Best's Insurance News (Sept., Oct., Nov., Dec. 1935). These articles take up the injuries of the practice, the causes of it, and specific instances of gross abuses of long-continued operation after insolvency.

ists, it seems that the rules of fraudulent conversion are applicable to the overpayment of surrender values and of salaries of management, especially if salaries are not reduced. The fact that both types of unsound practice are carried on under cover of deceptive reports, valuations, and accounting practices, increases the justification for application of the rules of fraudulent conversion in the worst cases.

6. Conclusions

There is ample judicial precedent holding that abuses in corporate management, taking the guise of loans, compensation, purchases and dividends, embody fully all the essentials of fraudulent conversion.[261] In extending the principles of fraudulent conversion to the other abuses considered above, no logical impediment in developing and applying the legal rules already established is encountered; it is discovered only that certain clearly indicated judicial tasks have not been adequately performed.

Two perplexities in practical application of the rules may be surmised and ought, perhaps, to be noticed here. The transactions are usually complex and often are intentionally made so. This fact may be supposed to present an insuperable obstacle to showing the essential aspects of a segment of conduct with clarity and simplicity in relation to the simple formula of fraudulent conversion. But if confusion in adducing the evidence and in its effect supervenes, that result is the fault either of unintelligent prosecution or of erroneous rulings by the court; for accountants may be called to explain their findings with regard to a mass of evidence[262] and, by capable examination of such witnesses, the essential aspects of an intricate course of conduct can be revealed. Efforts of defendants to obscure transactions and to confuse the evidence may be made, by an alert prosecutor, to militate against them, since secrecy and want of frankness are universally treated as evidence of fraudulent intent.[263] Then again it is, perhaps, infrequent that

[261]Frequently, there is concurrent prosecution for false entries when fraudulent conversion has been accomplished by means of them or it has been sought to conceal the embezzlement of misapplication by means of them. (See, for instance, Coffin v. United States, Hargreaves v. United States, House v. United States, United States v. Fish, United States v. Youtsey, United States v. Mulloney, all *supra* note 119.) Too, where the investments of existing stockholders or creditors have been plundered by fraudulent conversions, later investors are injured by false inducements at the time they invest rather than by mishandling of corporate funds after investment is made. The law of false pretenses has a bearing here. Both of these subjects are beyond the scope of this study.

[262]LeMaster v. People, 54 Colo. 416, 131 Pac. 269 (1913); People v. Wulff, 313 Ill. 286, 145 N. E. 108 (1924); People v. Preble, 316 Ill. 233, 147 N. E. 124 (1925); State v. Lancaster, 202 N. C. 204, 162 S. E. 367 (1932).

[263]See cases cited, *supra*, note 136.

single transactions clearly evidencing all the essentials of fraudulent conversion are found in mismanaged corporations where the greatest injury is done investors. Corporations are more likely to be wrecked by a series of doubtful transactions. If the trouble, for instance, is loans, it is more probable that there has been a series of loans, all shady, but no *one* showing fraud beyond doubt when considered alone, than that there has been a single clearly fraudulent loan doing enough damage to excite a criminal prosecution. Since specific acts must be alleged and proved,[264] it may be thought that often it is an impossibility to prove fraudulent conversion by means of any transaction, indisputable though it may be that gross injustice has been done by a general course of dishonest conduct. But it is to be remembered that "a single act charged in an indictment, standing alone, might be susceptible of inferences of honesty of purpose, or of mere mistake; which when viewed in the light of a long course of conduct, and of repeated acts of a similar nature intimately and directly connected with the particular accusation, would be utterly inconsistent with such inferences, and the fraudulent intent, with which the particular act was done, demonstrated beyond all reasonable doubt."[265] Hence, to continue the example of making loans, one, or a few, of the worst loans can be charged and the entire course of improvident and reckless loaning presented in evidence on the question of intent to defraud.[266] Particularly when the general course of conduct shows a distinct trend toward favoring those loans from which the defendant might gain some personal advantage directly or indirectly,[267] the case is a very complete one under the ordinary rules applying to embezzlement and criminal misapplication. The other forms of abuse are susceptible of like treatment.

V. Some Objections Answered—Conclusion

Although just and efficient application of the principles of fraudulent conversion, already developed in the law of embezzlement and related criminal breaches of trust, requires a high degree of judicial perspicacity, there is no logical or legal hindrance to the vigorous utilization of these principles in checking abuses in corporate management. However, to foreshadowings of more energetic and more extensive denunciation of these abuses as crimes, deprecation, quite vociferous though not exactly articulate, is

[264]See *supra* note 52, and text immediately following.

[265]Reeves v. State, 95 Ala. 31, 43, 11 So. 158, 163 (1891).

[266]See cases cited, *supra*, note 121.

[267]State v. Matsen, 188 Minn. 376, 246 N. W. 861 (1933); State v. Meininger, 306 Mo. 675, 268 S. W. 71 (1925); State v. Ross, 55 Ore. 450, 104 Pac. 596, 106 Pac. 1022 (1911); Hooper v. State, 102 Tex. Cr. 345, 279 S. W. 449 (1925). See also cases cited, *supra*, note 243.

made. Demurrers, ostensibly grounded upon doubts about the wisdom of using criminal process in this field, reveal that any one must have a lively conviction in favor of protecting savings invested in corporations before he is ready to endorse emphatic disapprobation of conduct jeopardizing those savings. *And there are those who do not have this conviction.* But, for the proposition that savings in corporate form are entitled to all the sanctity of property rights and to the full support of the law, the present writer feels under no obligation to argue.[268] The following words, recently uttered by the Supreme Court of Delaware, seem to provide a sufficient orientation to the subject: "The State is concerned also with the welfare of those who invest their money, the very essence of generation, in corporate enterprises."[269]

1. Benefits from Application of the Principles of Fraudulent Conversion to Corporate Mismanagement

Upon the assumption that the interests of investors ought to be safeguarded, it is fair to inquire what services to this end the criminal law does and can perform.[270] It introduces a complainant capable of commanding the respect of even the haughtiest transgressor. It provides sanctions which excite the apprehension of offenders unaffected by civil judgments, either because they have nothing with which to respond or because they have so much that compliance is a trifling matter. It furnishes support without which administrative regulation is ineffective. Moreover, it marshals moral sentiment by bringing obscured mazes of wrongdoing sharply within clear judicial conceptions and under traditional symbols of moral reprobation.[271]

A. Implementation for the Task

The criminal law is well implemented for dealing with the complicated factual situations encountered in corporate mismanagement. In this study, we have observed the search for grounds of decision in criminal prosecutions for breach of trust. We have noticed references to express prohibitions, to acts clearly departures from the trust, to violations of specific claims, and to loss and risk of loss to the *principal.*[272] But we have noticed more. We

[268]The subject is discussed at some length in an article by the present writer. Snyder, *Safeguarding the People's Savings—A Challenge to the Law* (1937) 9 MISS. L. J. 257-276.

[269]Keller v. Wilson & Co., Inc., 190 Atl. 115, 125 (Sup. Ct. Ind. 1936).

[270]This query may be considered to be an objection; at least it may evidence non-persuasion that the criminal law can afford the investor any substantial protection.

[271]See (1937) 9 MISS. L. J. 257-276.

[272]See Section I of this study, The Act of Embezzlement, *passim.*

have seen that, with the most dangerous conduct, uncertainty may be the result of applying these tests; and we have seen the courts turning then to the aspect of personal gain for the resolution of these doubts.[273]

a. Two Methods

In an article in *Illinois Law Review*,[274] the writer has discussed two well-established methods used by courts in dealing with embezzlement, there denominated the liberal and the strict practices. What each embraces is briefly indicated by the following excerpt from that article:

> "Under these (the liberal) practices it is possible to charge a fiduciary with one or more specific acts which need not be set out with exceeding nicety. Evidence embracing a wide scope of the surrounding circumstances may be admitted to support the charges. It may be shown that the accused has not performed his positive duties, and that he may have been guilty of misconduct resembling embezzlement as charged, without showing any particular act beyond a reasonable doubt. Upon such a showing, the accused is deserving of little sympathy. For, if he is honest, he can clear up the whole matter by disclosing the truth, and much can be made of his failure to explain, or his lying explanations. Then the fact-finder at the trial can well believe that a finding of some particular act is justified. Such a finding can be sustained by the court as being not against the evidence considered as a whole, certainly not manifestly against the weight of the evidence. The process of reasoning is indicated by one supreme court in sustaining a conviction for embezzlement in the following words: "Just what Sanders did with the money is not clear . . . . What is clear is that Sanders did not account to the Probate Court for the $39,018, nor disburse it as directed by Slabaugh's will." The total effect of subsuming a widening range of fact under the criminal law rubrics is to add weight to the accused's failure to do what he ought to have done, to minimize the importance of the particular wrongful act, and to constrain disclosure by the accused—all of which resembles, both as to procedure and as to the underlying substantive assumptions, the course of equity. In fact

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[273]2 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) 121, 122. See also notes 147, 243, *supra*.

[274]Snyder, *The Influence of Equity Principles in Embezzlement Prosecutions* (1936) 30 ILL. L. REV. 995.

it may not be too far-fetched to say that the tendency is to hold any act, other than one authorized, to be a conversion. However, it must be constantly borne in mind that, while the substance of equity concepts may be utilized, the proceedings are always carried on in the language of the criminal law; the precise what, whose, how, when, and where of the criminal conception of the crime are all purportedly found with patient fidelity.

This recognition of equity substance under the guise of criminal law terms amplifies judicial power. Proven rogues can be prevented from escaping their deserts because of failure in the mere niceties of proof. On the other hand, in any case, the verbal forms of the authorities permit insistence upon strict conformity to criminal law requirements. Thus, courts have two ways open before them, and the one followed in any instance may be chosen as the ends of justice seem to indicate. If the general evidence shows a rogue, they may be liberal in finding the elements of a crime; if the general evidence does not show a rogue, they may remain unmoved except by strict proof."

b. The Principle of Selection Between the Two Methods

The vital question is: By what shall courts be guided in determining whether the defendant is a proven rogue deserving of little sympathy to whom the liberal practices are appropriate or that the defendant is one to whom the strict technical rules shall be applied? In cases of corporate mismanagement, the answer is sure. The test is, whether or not the defendant has been acting for his own personal gain, since to do so is the essence of bad faith, the clear indication of fraudulent intent, and the plain signal that a fiduciary has passed beyond his authority. Of course, mere incidental or slight benefit to the accused is not enough; the prospect of personal gain must be such as to distort his judgment and impair his fidelity. However, in view of the universal attitude toward fiduciaries which requires them to establish their good faith, the courts are not left helplessly floundering in a welter of conflicting inferences. The evidence must show that the prospect of personal gain was absent, slight, or incidental. If the evidence does show that the prospect of personal gain was so substantial that prolonged argument is required to achieve a delicate perception that it might not have been an effective factor in motivating the defendant's conduct, there is no answer except that he was unfaithful in intermingling his own interests with the performances

of his duties to the beneficiary of his trust. Two or three illustrations will suffice to make the point still clearer.

a'. Examples

Let us suppose that the market price of a corporation's stock is threatened by "economic conditions" or by the operations of outside speculators. The management conceive that it is advisable to use corporate funds to sustain the market.[275] They do so, but make a bad guess and lose the funds so applied. Then they are charged with embezzlement or criminal misapplication of these funds. On the assumption that no express prohibition of such an action by the management exists, two situations must be considered: (1) The threat to the market price of the stock is real; the benefit to accrue from maintenance of the price is genuine; the prospect that the use of corporate funds will accomplish the objective is reasonable; and the management purchase for the sole benefit of the corporation. All stock is held for the benefit of the corporate treasury. Any profits are routed unmistakably to the corporate treasury. Any gain that the management may make is only that which accrues to them incidentally as *bona fide* stockholders or creditors and is in the due proportion in which their interests as such appear. In such a case, it seems that one can say that they are innocent and that they acted meritoriously. Surely, one must say that they are entitled to the strict practices of the technical criminal law. (2) Let it be assumed that the threat to the market price is real; the advisability of maintaining the market manifest; and the prospect that using corporate funds will accomplish the objective reasonable. The management cannot justly be held to be guarantors of the results of their actions. But suppose that, instead of purchasing for the benefit of the corporate treasury, they advance funds and credit to a syndicate who are to obtain any profits made and to share these profits with the management, then a prospect of gain exists which is peculiar to the management and is not shared by stockholders and creditors generally. In such a case, one cannot say, in a "curbstone opinion" that the management are guilty of a criminal breach of trust; but they are certainly fit objects for application of the liberal practices in a prosecution therefor.

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[275]See Morrissey v. United States, 67 F. (2d) 267 (C. C. A. 9th, 1933); *rehearing denied* 70 F. (2d) 729 (C. C. A. 9th, 1934), *cert. denied* 293 U. S. 566 (1934); House v. United States, 78 F. (2d) 296 (C. C. A. 6th, 1935), *cert. denied* 296 U. S. 608 (1935); People v. Talbot, 22 P. (2d) 587 (Cal. App. 1933), 220 Cal. 3, 28 P. (2d) 1057 (1934). See note 128, *supra*, on the duty of directors to sustain the market.

A corporation needs a piece of land. The management buy a tract and pay a very high price for it. The price, however, is not absolutely beyond all reason. If the land is bought from outsiders, one situation exists. But if it is bought from another corporation or enterprise in which the management are personally inerested, or from business associates from whom the management have received personal favors, or in a location where properties owned personally by the management will be peculiarly enhanced, another situation exists;[276] and, especially so, if this is one of a number of similar transactions. In this latter situation, the liberal practices are obviously appropriate.

In making loans, corporate managements must incur risks and they ought not to be held to be guarantors of repayment. The best of borrowers may fail; values of property often do prove deceptive. If the loans are made to outsiders, only a grievous case where loss is plainly foreseeable may be criminal. But if the loans are made to the management personally, or to their business associates or members of their families, or to enterprises in which they are personally interested, or for the purpose of aiding speculative developments which will enhance the value of their personal ventures, the situation changes; and the application of the liberal practices in criminal prosecutions for the loans is justified.[277]

c. Conformity with Demands of Justice

Utilization of the criterion of personal gain, for selection between the strict and liberal practices in criminal prosecutions for breach of trust, is in conformity with the essential nature of the criminal law. The criterion satisfies that demand of justice which is that the defendant be condemned on his own deserts and not merely for the good of another. Fiduciaries who act for their own personal gain are guilty of conduct morally the most reprehensible. For one stranger to injure another may be wrong; but the treachery of one who has undertaken a trust specially reposed in him is worse. Such conduct is of the essence of immorality and criminality among all peoples.[278]

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[276]Compare: Agnew v. United States, 165 U. S. 36 (1897); People v. Cobb, 343 Ill. 78, 174 N. E. 885 (1931); Yoder v. State, 194 N. E. 645 (Sup. Ct. Ind. 1935); People v. Marcus, 261 N. Y. 268, 185 N. E. 97 (1933).

[277]See cases cited note 119, *supra*.

[278]See, *supra*, especially note 178. "From what has been said in Sec. 4, we may conclude that the element of immorality requisite before a harmful act can be regarded as criminal by public opinion, is the injury to so much of the moral sense as is represented by one or the other of the elementary altruistic sentiments of *pity* and *probity*. Moreover, the injury must wound these sentiments not in their superior and finer degrees, but in the average measure in which they are possessed by a community—a measure which is indispensable for the adaptation of the individual to society. Given

d. Service of Public Need

Human effort cannot prevent all loss to corporate investors; but the interests of investors would suffer few major losses, if transactions of management motivated substantially by personal gain to directors and officers were rigidly regulated and abuses unflinchingly suppressed. Purchases must be made, loans granted, salaries paid, and dividends declared; and these, as all other business transactions, entail the chance of error. But economic history and the cases in the law reports disclose that the losses causing widespread harm result from transactions in which the directors and officers have the prospect of personal gain.[279]

e. Due Process and Timely Warning

If the courts were to let it plainly be known that those directors and officers, who mix their own personal interests with corporate affairs, will, if their plans miscarry and their grandiose hopes fail, be subjected to the liberal practices in criminal prosecutions[280]—that they may have to face aroused juries with the technical shields of the criminal law taken from them and on terms like those given faithless trustees—the certainty that they take this risk might serve as a deterrent to them in lush times when deterrence can be of some effect. There would then be, in times of economic distress and depression, less wailing about persecution and less complaint that defendants did only what was regarded as right when they did it, while later, in a wave of popular fury, they are unjustly immolated to that wrath. True it is that managements may enter into transactions in which they stand personally to gain and yet the collapse of a particular corporation result specifically from other causes. But depressions are generated by

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such a violation of either of these sentiments, and we have what may properly be called *natural crime.* (page 33)

"In the second category—offense to the elementary sentiments of probity—are comprised: (a) attacks upon property involving violence, viz.: robbery, extortion by threats, malicious mischief ("devastation"), arson and the like; (b) attacks unaccompanied by violence, but involving breach of trust; obtaining money by false pretenses; embezzlement; and conveyance of property in fraud of creditors ("insolvabilité volontaire"), bankruptcy occurring through negligence or fraud ("banqueroute"), the revelation of professional secrets, the misappropriation of literary property ("plagiat"), and all the various forms of counterfeiting tending to injure the rights of inventors and manufacturers; and (c) all indirect injuries to a person's property or civil rights occasioned by false statements or entries made in some formal or solemn manner, among which may be mentioned perjury, the forgery or spoilation or official documents and records ("faux dans les actes authentiques"), the substitution of children, and the suppression of civil status ("suppression d'etat civil")." (pages 40, 41). GAROFARO, CRIMINOLOGY (Millar trans. 1914) in MODERN CRIMINAL SCIENCE SERIES (1914).

[279]See (1937) 9 MISS. L. J. 257-276.

[280]See (1936) 30 ILL. L. REV. 995-1013.

the excesses of just such transactions. If the law plainly warns directors and officers that there is one way to escape being placed at the mercy of wrathful juries under the liberal criminal practices and that is to be sure that their personal interests do not become involved in their conduct of the corporate business, that warning is given in time and those who do not heed it have no complaint about *ex post facto* condemnation or about uncertainty as to what guide to follow. And this stern judicial admonition promises protection to those to whom protection is due and by whom sympathy is deserved.

f. Concealed Offenders

Frequently the remark is heard that the real offenders cannot be reached; that they remain concealed in the background and, although their presence and their movements are known, sufficient evidence cannot be obtained to establish their guilt or they are too powerful to be brought to book; and that the directors and officers formally in charge are often but tools who are sacrificed, by those who need them, when criminal prosecutions threaten. We have noticed how those in "control" may, especially as aiders and abettors, be brought within the ambit of the law of fraudulent conversion.[281] These principles lend some aid but they do not show how evidence can be discovered or how the powerful and defiant may be overcome. These powerful persons may laugh at civil judgments, in favor of persons able to procure them, which, if paid, will be paid with funds obtained by new plundering of other investors who are unable to avail themselves of the protection of expensive civil litigation. But the criminal law affords means of reaching the practices, if not the persons, of these powerful individuals. Little manipulation of corporations is possible unless, sometime, somewhere corporate funds are paid out. To the paying out, the formula of conversion applies. No one can do that paying out, except some officer or agent in 'possession'. This person can be reached by criminal sanctions and as well directors and superior officers having formal legal relations who act with or through him. The officer paying out and the others having formal legal relations who act with him may be dupes and tools. Stern condemnation of them for their knowingly lending themselves to the artifices of others, which carries an ever-present threat of penal servitude if they do so, will make dupes and tools hard to employ and their price high. In fact, it might be impossible to plunder a corporation, because so many tools might have to be bought and paid for and so much protection against criminal prosecution guaranteed that it might be more profitable

[281]See *supra* notes 23 and 24, and text appertaining.

for those in "control" to be honest. Dupes might be gotten cheaply. But when dupes are relentlessly prosecuted, they will talk to save themselves. And their talking might turn up the evidence for further prosecutions.

g. Technique Adapted to Broad Basic Distinctions

Another advantage which the criminal law has is that it requires broad and sure distinctions upon which to base its judgments.[282] The evidence must be clear. This technique is adapted to the delimitation of claims and duties in terms of their plainest aspects. Since we have seen that the problem of protecting corporate investors is basically one of defining claims of stockholders and of creditors and of defining the powers and duties of directors and officers, the broad outlines which must first be drawn, later to be detailed in civil cases, are peculiarly the province of the criminal technique which searches for a few outstanding elements shown beyond doubt.

h. Practicable Areas for Elaborating Concepts

It is not to be expected that all prosecutors and courts will, immediately or ever, espouse and consistently follow a strong course in applying criminal concepts to corporate abuses. But the more alert and able prosecutors before the more perspicacious and courageous judges can make, and already have made, much headway by acting vigorously in the plainer cases. The farseeing judge on an appellate bench can, by means of the dissenting opinion,[283] render helpful service through more critical analyses of factual situations and more accurate definitions of what investors are in reality entitled to expect and of what the powers and duties of directors and officers are. These procedures will give point and add strength to public sentiment.

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[282]See (1937) 9 MISS. L. J. 257-276.

[283]Observe the import of the following footnote appearing at page 237 of HALL, LAW, THEFT AND SOCIETY (1935): "Quite obviously it is possible to write a history of law in terms of great judges and lawyers. Such phenomena as dissenting opinions, reversals by upper courts, and other changes *within a short period of time*, all suggest the operation of individual, unique influences, or at least make such a hypothesis defensible. Certainly it seems clear that judges like Brian, Choke, Coke, Mansfield and Buller have left many distinctive touches upon the law and have greatly influenced its development. These judges and all of the others functioned in a milieu which was determined very largely by existing legal, social, political and economic institutions and their inter-action. The interpretation of the law of theft that follows concerns itself with this latter aspect of the complex pattern set by the operation of many converging forces."

Cf. Vinogradoff, *Aims and Methods of Jurisprudence* (1924) 24 COL. L. REV. 1; L. K. Frank, *An Institutional Analysis of the Law* (1924) 24 COL. L. REV. 480; and Evans, *The Dissenting Opinion—Its Use and Abuse* (1938) 3 MO. L. REV. 120.

i. Summary

The foregoing reflections afford a modest assurance that the criminal law applicable to breaches of trust does perform substantial services in protecting savings invested in corporations, and that it is susceptible of further and still wider and more effective use to that end. Confirmation of this belief comes from some of the objections made to the applicability of criminal process to corporate mismanagement. The speciousness of these objections and the want of conviction that the investors ought to be safeguarded which they display arouse not a little suspicion that the concern of their authors is really an apprehension that effective protection will be provided for the investor's interests.

2. Lack of Precedent

One of these objections is that precedent is lacking or is too scanty for the application of the principles of fraudulent conversion to many of the abuses. This cavil is elaborated to the effect that these principles may be proper in the instance of banks and insurance companies and such strictly "savings institutions" but not in the instance of "business" corporations. The objection has all the cogency of that perfection of reason which, after it is well established that kidnapping can be committed by carrying a person away on horseback, affects to doubt the applicability of the formula to carrying away the victim in an automobile. Furthermore, it is in reality an expression of distrust of the judicial process and the judicial system. It suggests that the judicial process is not adapted to sifting, and that the judiciary have neither the intelligence nor the integrity to sift the evidence in certain types of cases; that courts are incapable of discovering therein whether or not fiduciaries have been acting for their own benefit, of ascertaining and defining what rights and obligations exist, of determining whether or not violations have occurred, and of making due and just allowance for actual differences in different types of enterprise. Although this work of defining and protecting rights and liberties is just what courts are established to do, the objection asserts that the traditional system of justice by due judicial process has no business interfering in such cases. And the objection totally overlooks the consequences of consistent suppression of transactions, for the personal gain of management, in the savings institutions. Much corporate promotion and speculation is impossible, if massed savings in the savings institutions cannot be drawn upon. If the managements of these savings institutions handle the funds entrusted to them carefully and without attempt to make speculative gains for themselves, they must restrict the

flow of funds to those corporations of other types which are most carefully managed. Thus, consistent adherence to the already abundant precedents, especially as to loans and purchases, for the use of criminal sanctions with respect to the mismanagement of savings institutions will work an indirect control over other enterprises, besides setting standards of good practice and corporate morality.

3. The Innocent Are Penalized

Another objection is that the use of criminal process in the field of corporate mismanagement results in the conviction of the innocent. It is said that the prosecutions come in times of depression and that, in a wave of popular fury, the innocent are slaughtered because they could not foresee the unforeseeable. This objection is an even more deadly attack on the capacity and integrity of the judiciary. While it is true that judges are powerless to protect the public when hysterical, dumb, or venal juries free the guilty, trial judges and appellate courts have ample power to protect the persecuted innocent, by quashing indictments, controlling the introduction of evidence and the course of proceedings, and setting aside verdicts. Is it contended that these judges cannot discern the merits of the case brought before them well enough to determine when to exercise their powers, or that they lack the character to follow their discernment in their official rulings? Is it asserted that the courts cannot see when the aspect of personal gain is sufficiently present in a case involving a fiduciary, so that they can follow correctly the liberal practices in criminal prosecution, when they have before them defendants who are faithless and dishonest, and can turn to the strict technical criminal rules when the defendant is entitled thereto? Do these matters of corporate management require so esoteric an intelligence and such an unlimited privilege of mystery that only corporate managements, but not courts, may be permitted to have opinions concerning them? Moreover, if courts warn in advance that corporate officers and directors who mix their personal interests with corporate business must take their chances with wrathful juries, there is no ground for complaint about *ex post facto* persecution, unless, of course, the temptation to fill their own pockets, at the expense of the beneficiaries of their trust, is so insidious that these officers and directors cannot know when they yield to it. And if this latter be the case, is it proposed that the more dangerous the temptation the less stern must be the warning against it?

4. Enterprise Will Be Paralyzed

One final objection will be noticed, and this is, that rigor in dealing with those who manage corporations will paralyze enterprise. "The most formidable form of this plea is that which represents to us that in modern industry the most important factor is the brain of the great organizer; that this will only work under the stimulus of unlimited acquisition of wealth and personal power; and that if in our own country this power of unlimited acquisition is restricted, the men of greatest initiative will go to countries where no such restrictions exist, and our own industrial life will suffer. This is a terrible argument—the argument that what is most powerful in men cannot be induced to act in the public interest but only on the motive of unrestricted selfishness."[284] In the present study we are not concerned with large acquisitions or with selfishness, but only with the suggestion that those who manage corporate enterprises are not amenable to the legal rules and the morality ordinarily applicable to fiduciaries; for this objection implies that capable managers cannot be procured if they are expected to operate the corporate business for the benefit of the corporation and to take their compensation directly from the corporation in an open definitely determined amount, but they must be permitted to operate the corporate business for their own personal gain irrespective of the claims and expectations of stockholders and creditors. It is a bold assertion that investors cannot dispense with men of this kind and, hence, must live with them on their own terms, and that the ordinary principles of fair-dealing both legal and moral applicable to the ordinary citizen have no place in judging their conduct, if indeed their conduct is to be judged by others than themselves.

The Supreme Judicial Court of Massachusetts has answered this objection in words stronger than are needed with respect to liability for wilful wrongdoing, since the language refers to liability for mere negligence. The court said: "It may seem hard to these defendants to be held to this liability. The standard of due diligence and capacity on the part of directors and of liability for negligence has been thoroughly established. It is not so onerous that business men will be afraid to take office as directors. It is essential for the protection of the depositing public."[285] Then, to the suggestion that capable managers of mere moderate demands cannot be procured, a counter-suggestion may be made. There once was a time when the commanders of armies made great per-

[284]MARSHALL, INDUSTRIAL SOCIETY (1918) 969.

[285]Prudential Trust Co. v. McCarter, 271 Mass. 132, 157, 171 N. E. 42, 53 (1930).

sonal fortunes out of war. It doubtless was a fashionable contention in those times that, unless the making of these fortunes out of the profits of war were permitted, capable military leaders could not be procured who could successfully lead armies in the public defense. But General Pershing commanded, not unsuccessfully, an army still larger than any of those days; and, if any one should have the hardihood to suggest that he devoted himself to making his own fortune out of plunder and war contracts and took any more than his legal pay and allowances, the American people would rise as a man to denounce the calumny. And to the suggestion that some are so powerful that they will not submit to and cannot be brought within the ordinary rules, a counter-suggestion too can be made. The course of history is strewn with those who arrogated to themselves a claim of their indispensability and of their being beyond the rules and laws which govern ordinary men. Our legal system, the genius of which is equality before the law, claims as its noblest memory the words of a judge to a king that even he was not above a common law.

5. Confusion and Illusions

These objections have been considered in generalities and in a somewhat oratorical vein, a manner of treatment not pointedly instructive in a legal study but unavoidable because of the general character of the objections themselves. It is enough to observe their implications. But the confusion of thought which admits of their being taken seriously must be remarked, and the illusions from which they arise indicated.

The feeling that those who control and manage corporations must be let alone is strangely involved with the tradition in which getting ahead through the accumulation of property has so large a part.[286] In some curious way, it is inferred that corporate managers, when they are doing as they wish with the property of others, are fulfilling this tradition of success and exercising the pure liberty of doing as they please with their own. While it is easy to understand why the managers welcome a confusion of thought which makes such a conclusion possible, it is hard to understand why the investor should not discern its contradictions and should not object to being denied the benefit of his own merely because the managers want to appropriate it to *their* pleasure. This

[286] "The institution of private property (namely, that what a man honestly acquires is his own) and our fundamental idea of liberty (namely, that a man may do as he pleases if he does not invade the rights of others) lie at the basis of our industrial system, and any change in any one of the three would destroy the other two." 2 WILLIAM W. COOK, AMERICAN INSTITUTIONS AND THEIR PRESERVATION (2d ed. 1929) 542.

confusion, in which corporate property is identified as the property of those who control and manage,[287] and in which corporate purposes and interests are taken to be the same as the personal purposes and interests of the dominant personalities in management, is fostered by an illusion. This illusion is that a man marked by diligence and capacity in acquiring for himself has necessarily the only qualification required of a manager of the property of others, whereas that characteristic might be questioned as a disqualification. A further illusion, or rather delusion, lurks in the background of this confusion. Dominating personalities in management flatter themselves that they are beyond the import of common wisdom about serving two masters and working at cross purposes. They fondly indulge the conceit that they can pursue their own interests and corporate interests with equal eagerness and fidelity and without impairment of their judgment; that they can do inconsistent things at the same time and do them well.[288]

No one will deny that corporate 'property' does not belong to the directors and officers or to those who control them, or that any attitude which blurs the fact that this 'property' is not their 'property' is contradictory to the judicially established concept of the corporation. No one will deny that a servant, bailee, agent, trustee, or other fiduciary is not dealing with his own but with the 'property' of others; or that it is the function of any fiduciary to serve the interests of the beneficiary of his trust; or that the law, as well as common sense, has always regarded it as beyond the capacity of any man to serve the interests of his beneficiary when he is pursuing his own interests; or that a fiduciary must, under the penalties of the law, subordinate his own interests, even to the extent of disregarding them, and, if he does not care to do this, his only recourse is not to undertake the obligations of a fiduciary. It is reasonable to believe that the proponents of contentions, which presuppose that those who control and manage corporations must be let alone to pursue their personal ends, ought to support their thesis with some less frivolous and less immature argument rather than impudently to demand that the principles of the property sys-

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[287]The identification of the corporation with the officers and directors is shown by the style of a stockholder's suit for mismanagement. Although the action is really one of the corporation against the management, the corporation is a defendant rather than a plaintiff and its name is identified with the management rather than with the stockholder who is asserting the corporation's claim against the directors and officers.

[288]Note the implications of the testimony appearing at pp. 388-390, *Report of Comm. on Banking and Currency*, Sen. Rep., 73rd Cong., 2d Sess. (1934); and at pp. 170-172, *Rep. on the Study and Investigation of the Work, Activities, Personell and Functions of Protective and Reorganization Committees*, Part III, (S. E. C., 1936).

tem judicially established be justified.[289] The venerable moral distinctions between mine and thine, the corporate concept, and the nature of the fiduciary relation, all embodied in legal principles developed by the process of judicial inclusion and exclusion, offer a surer guide than confusion between mine and thine and the illusions of conceit.

Conclusion

No reason has, as yet, been advanced why the principles of fraudulent conversion are not applicable to corporate mismanagement. The procedure is a proper function of the judicial process. The principles of fraudulent conversion, judiciously administered, will check the grossest abuses in corporate management and provide a necessary support to civil remedies and administrative regulation.

From conversations had while working on this study, the writer has received the impression that he may be expected to essay, at the end, the role of a prophet. This he does, in some measure, without trepidation. If savings invested in corporations are not given more nearly adequate protection, we shall have a different economic and legal system.[290] If these savings are protected, the criminal law will be found to be a decisive factor in that protection. Whether or not the savings ought to be protected in accordance with the logic of the corporate conception and of the principles of fiduciary relations judicially established and elaborated, the reader must answer from his own beliefs. To the writer there is but one answer. How far the present unmistakable tendency—to afford better protection to these savings by means of more vigorous use of criminal processes[291]—will go is a question calling for prophetic vision of which the writer disclaims possession.

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[289]The fiduciary always has the burden of proof in justifying his conduct. *Factors*: Brown v. Funck, 89 Kan. 601, 132 Pac. 202 (1913); Anker v. Smith, 87 N. Y. S. 479 (1924). *Brokers*: Breene v. Corey, 210 Mass. 536, 97 N. E. 70 (1912). *Partners*: Laswell v. Robbins, 39 Ill. 209 (1866). *Trustees*: Knowlton v. Fourth-Atlantic Nat. Bank, 271 Mass. 343, 171 N. E. 721 (1930). *Servants*: 1 Labatt, Master and Servant (1913) 84 *et seq.*

In criminal cases a prima facie case is made against him when the beneficiary is shown to have sustained loss. See, *supra*, note 165.

[290]See (1937) 9 Miss. L. J. 257-276, especially n. 30, page 272.

[291]Note that most of the cases cited *supra* note 119, on loans are late, more than half being in the 1930's. In the latest cases, the most vigorous opinions appear. People v. Talbot, 22 P. (2d) 587 (Cal. App. 1933) 220 Cal. 3, 28 P. (2d) 1057 (1934), is notable, not only because of its vigor, but also because of its involving the mismanagement of a manufacturing corporation. It shows the spread of the treatment of loans as crimes from those made in the conduct of banks to those made in the affairs of business corporations generally. Note also that three of the four cases cited *supra* note 174, on purchases, bear dates since 1930.

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STATE BAR SECTION

BAR COMMENTS

Comment on Report of Committee on Pleading, Practice and Procedure

*Geo. H. Ethridge**

At the last meeting of the State Bar at Vicksburg, a Committee on Pleading, Practice and Procedure was presented in accordance with the resolution adopted at the Meridian meeting of that organization in 1937. Pursuant to the resolution there adopted, the President of the State Bar appointed the other members of the committee not named in the resolution then adopted, the names of such members appearing on page 416 of the October number of the Law Journal, in the report to the Bar meeting. Five propositions were reported to the State Bar for consideration, and after some discussion, appearing on pages 418 to 431 of the October, 1938, issue of the Law Journal, the matter was continued, and referred to the next meeting of the State Bar, with the understanding that the explanation of the propositions made by me, as Chairman of the Sub-Committee, should be published in the issue of the Law Journal immediately preceding the next meeting of the State Bar.

1.

The first proposition recommended reads as follows: "That in trials in justice of the peace and other courts, from which appeals lie to the circuit court, and are tried *de novo*, where a jury trial is had the jury need not be unanimous, but two-thirds thereof may agree upon a verdict in civil cases and in misdemeanors, and this shall be treated, for all purposes, as the verdict of the jury, judgment being entered thereon in the same way, and with the same effect, as if it were unanimous. This, it is thought, will save delay and expense. But this procedure should not be applied to courts where the jury verdict is final, and the appeal is upon the record.

There is no constitutional provision as to jury trials in justice of the peace courts, and consequently it would be permissible, without an amendment to the Constitution, to enact a statute of the kind recommended, where less than a unanimous verdict would be received in such inferior courts, and judgment entered there with the same effect as if the verdict were unanimous. It often happens in trials in the justice of the peace courts that one party demands a jury, which fails to agree, necessitating another trial on another day, delaying the disposition of the cause in that court.

*Associate Justice, Mississippi Supreme Court.

The provision recommended would apply to civil cases in the justice of the peace court, and to misdemeanor cases which may there be finally disposed of. The people of the state have approved by constitutional amendment a nine-jury verdict in civil cases in the circuit court, and in the county court where there is such court. The provision for two-thirds of the jury to agree on a verdict seems to me to be an ample safeguard against injustice; but either party, if he so desire, may appeal to the circuit court, and there get a constitutional jury of twelve men, who would be instructed in the law by the circuit judge, on the request of counsel. In a justice of the peace court there is no person to instruct the jury on the law, and having a jury trial in such court, while highly desirable in many cases, delays the trial, and increases the expense when the jury disagrees. This provision would seem to promote speedy justice, without any injurious consequences.

2.

The second proposition reads as follows: "That Section 568, Code of 1930, providing that variance shall not be material in any case where the attention of the court is not called thereto, should be repealed, as pleadings should be a part of the record, and the effect of the judgment should be *res adjudicata* only where there is evidence to sustain the action set out in the pleadings. The opposite party should be enabled to rely upon the action stated in the pleadings, and not be put to the hazard of oral proof to show what was involved in the action. He is entitled to rely upon the specific action set forth. Pleadings now can be amended when necessary to achieve the ends of justice at any time before rendition of the verdict, and this should remain the law. But a litigant should not be allowed to present one cause of action, and recover on evidence in another.

It seems to me that a party to litigation should be required to stand upon the pleadings, and to make in the evidence the same case as is made in the pleadings—not another case under the law, different from that stated in the pleadings. If necessary the case can be brought within the pleadings by amendment. The pleadings would constitute a permanent record of the cause of action, and parties thereafter could stand upon the record, pleading former adjudication, or *res adjudicata,* the second suit being brought upon the same matter. This would enable the opposing party to know, in advance of the trial, the case he was to meet, and would tend to secure justice. It seems to me to be highly desirable to have a written record not subject to parol variation or disputation, so that a party would know that he was secure in his rights when they had once been adjudicated. One should not be put in jeopardy of his rights by having to meet parol evidence on a subsequent trial, to show that there was a variation, and that the cause stated in the former suit was not the cause actually tried.

3.

The third proposition recommended reads as follows: "That Section 586, Code of 1930, be amended so as to permit the circuit judge, when after both sides have offered their instructions, he shall be of the opinion that applicable principles have not been requested, to call attention to such omissions in the absence of the jury, and suggest to counsel on both sides to draft such principles; and, upon their failing to do so, to draft them himself, and give them in charge to the jury in writing. But counsel on either side may except to the giving of such instructions, and shall not be held to have waived their right to object by using them, as they shall be required to do, in other cases. The judge may modify, refuse or give such instructions prepared by counsel under his directions, and such modification shall be held applicable for the use of such instructions, as required. That the Section be amended so as to read: The judge in any case, civil or criminal, shall not sum up or comment on the testimony or charge the jury on the weight of the evidence, but at the request of either party he shall instruct the jury, in writing, upon the principles of law applicable to the cases. All instructions asked by either party must be in writing, and all alterations or modifications of instructions given by the court, or refused, shall be in writing, and those given must be taken out by the jury on its retirement. Whenever both sides have presented to the judge the instructions which each desires to have given in charge, and if the judge shall be of the opinion that other or additional instructions should be given, he shall, in the absence of the jury, call attention of counsel on each side to such principles as he thinks should be given in charge, and request them to prepare and present such instructions in writing; and if, after such request, counsel do not present suitable instructions on such propositions, the judge shall give on his own judgment such instructions in writing to the jury for their guidance; but either side may object or except to the giving of such instructions, or any of them, and shall not by using the instructions waive his or their objections, and such objections may be assigned for error on appeal. But the use of an instruction modified by the judge over objection, shall be held to be a waiver of the objection. All instructions shall be marked by the clerk before the jury retires, 'given', 'refused', or 'modified', as the case may be, and being thereupon filed by the clerk becomes a part of the record, without a further bill of exceptions. All instructions for either side shall be read to the jury before arguments begin."

Jury trial in this country is a trial by judge and jury, each having a function to perform under the law; such trial to be held under the law of the state, applied to the facts involved in the case. Under our present practice a judge may not, in any case, give an instruction not requested by counsel. While we believe in written instructions—not in oral charges by judges—and believe in counsel

having the benefit of preparing the applicable law for the judge's consideration in instructing the jury, I think that the jury should be given the law applicable to the case in a charge. It seldom happens that, where lawyers of large trial experience are engaged in a case, full instructions are not secured; but for some reason, mainly through lack of experience on the part of lawyers engaged in the trial, it often happens that the law applicable thereto is not given.

The proposition submitted safeguards the interests of those concerned by requiring the judge to call attention of counsel to the omission of proper instructions, and to give them opportunity to prepare them, and present them to the judge. They would also have the right to argue to the judge, or have the right to be heard on the proposition before the judge, as to whether the proposed instruction is, in fact, applicable to the case. Trials should be had in accordance with the law, and it is a part of jury trial, as it should be, that the jury shall take the law, as given in the charge by the judge, as the only applicable law to be applied to the case. They have a rule by which to go, and it should be required that the rule be furnished them for their guidance, to the end that the justice of the law may prevail over caprice or whims or passion.

Should the judge give instructions on an admitted proposition, and commit any error therein, under the proposed law counsel would have the right to have such error corrected on appeal. While it does not happen with great frequency that cases are tried without proper guidance as to the law, yet it does sometimes occur; and this should be corrected. Under the proposed draft there is no infringement of a rightful prerogative of counsel.

4.

The fourth proposition reads as follows: "That Section 1272, Code of 1930, be so amended as to permit persons jointly indicted for the crimes of robbery, larceny, burglary or kidnapping to be tried jointly, in the discretion of the judge, where the evidence for the state is against all of them. That said section be amended to read: Any of several persons jointly indicted for a felony (except burglary, kidnapping, robbery or theft) may be tried separately on making application therefor before the order for a special venire in capital cases, and before arraignment in other cases. In cases of kidnapping, burglary, theft or robbery, where more than one defendant is charged, the evidence being the same against all of them, they shall be tried jointly; but where, for good reason shown, the trial judge is of the opinion that a prejudice or bias existing as to some of them may affect others in a joint trial, or where one may have a special defense which might be prejudiced by a joint trial, or in cases where the state has evidence as to one or more which is inapplicable or prejudicial to others, a severance may be allowed."

It seems to me that in this day of criminal organization on a large scale, extending beyond state limits in many cases, and involving many persons operating as a business in crime, it would be properly within the discretion of the court to try all the parties thereto jointly, as may now be done in misdemeanor cases. No harm has ensued from the practice of trying numerous defendants together in misdemeanor cases, where the defendants have voluntarily associated themselves together for the commission of crime. Wherever this is done the act of each is the act of all, within the scope of criminal purpose. Where there are a large number of defendants, each entitled to his separate trial or a severance as a matter of right, it is impracticable, and almost impossible, to bring them all to trial within a reasonable period of time. The Section safeguards their rights sufficiently to prevent any injustice, it seems to me, and it certainly would expedite the trial of criminal cases and tend to give the law-abiding citizen the protection of the laws designed for that purpose.

If parties voluntarily associate themselves together to violate the law, they should not be allowed to complain that they are tried together for the commission of acts vountarily done through conspiring together. The proposed Section singles out the character of crimes usually committed by professional criminals, making crime a business, and engaging therein for the profit which they may reap from united action. This would reach not only the persons who are actually present when the crime is committed, but their confederates who are aiding them—in this way providing adequate law enforcement.

I am aware that this involves a change, and I am not one of those who believe in change for its own sake. But modern conditions have developed the necessity for efficient administration of law in dealing with organized crime and criminals.

In trials so conducted, should it appear that a particular defendant was prejudiced, he could have a correction of such prejudicial action by taking an appeal, or by other appropriate step, or by having the trial judge make appropriate rulings or give appropriate instructions to protect him from injustice.

5.

The fifth proposition reads as follows: "That all motions for security for costs shall be filed and notice given thereof to the opposite party, or his attorney, at least three days before the first day of the term of court to which the same is sought to be heard, and in default thereof, the same shall not be entertained; and the filing of such motion shall not in any case be a sufficient appearance on the part of the defendant, but he shall proceed with his pleading as if no such motion had been filed."

This proposition is intended to prevent delay by requiring the motion for securing of costs to be filed, and notice thereof to be given to the opposite party prior to the first day of the term, so that he may give the bond, or be prepared to do so, without delaying the trial in court. This expedites the administration of justice, secures parties to the suit against unjust costs, and does not compel people to attend as witnesses or jurors without being given their costs.

It seems to me that each of these propositions would serve a good purpose, would promote speedy transaction of the court's business, and would tend to secure the safety of the community and of the state at large.

I accepted with reluctance a place on this committee to study these questions. I do not believe in undue experimentation with the law. We should proceed by the method of trial and error, seeking to correct mistakes, and to try reasonable expedients, guarding against injustice. I joined in the presentation of these recommendations because the State Bar desired to have these propositions—or some looking to the improvement of the procedure—submitted to it for its consideration. I realize that where lawyers are gathered together there will be differences of opinion; and I have never assumed that judges are greatly different from other lawyers. Had not the State Bar itself provided for judges to serve on the committee, I should have declined. Whatever the State Bar may do with the propositions, its action will be accepted without disappointment, or any feeling that they have tried to do anything other than promote the proper and efficient administration of the law, whose ministers they are.

Activities of the Junior Bar Section 1938-1939

To the Members of the Junior Bar Section of the Mississippi State Bar:

On behalf of the Executive Committee of the Junior Bar Section I wish to thank the committee chairmen, members of the committees, and the other members of the Junior Bar Section who have given untiringly and unselfishly of their time in the work of the Junior Bar Section this year.

The reports of several of the committees which will require affirmative action by the Junior Bar Section are being published in this issue of the Journal, but we wish to make a short report giving an idea of the activities of this Section. We hope that the existence of this Section will be justified by the work which has been done in the past and continued this year.

The number of matters to be considered by the Junior Bar Section has required us to plan both an afternoon and evening meeting of this Section of the Bar. There will be presented twelve suggested changes in Mississippi statutes to remove inaccuracies and conflicts; whether or not the Federal Rules should be adapted to use in the Mississippi Courts; the creation of the Bureau of Investigation, Identification and Statistics, and several other matters of importance to the members of the Junior Bar Section.

The chairman wrote to every member of the Junior Bar Section asking their suggestion for activities for this year, and all submitted were considered by the Executive Committee; each member was also asked to advise the phase of the work in which he was interested, and all who answered before the committees were appointed, were placed on such committee.

The Junior Bar Section became affiliated with, and is now recognized by, the Junior Bar Conference of the American Bar Association. This carries with it no committments but places the resources of the Conference at the disposal of the members of the Junior Bar Section and enables our Section to cooperate with similar organizations throughout the United States.

A complete study of the desirability and feasibility of the Legislative Drafting Committee was made by a committee of which John Morgan Stevens, Jr. was chairman. The purpose of such committee would be to offer its services to the legislature in the preparation of legislation so as to aid in eliminating inaccuracies and conflicts. As the legislature did not meet this fiscal year the recommendations of this committee will be passed on to the new officers of the Junior Bar Section.

This was also true of a Legislative Committee of which William A. Bacon of Durant was chairman. Their recommendations will be passed on to the new officers of the Junior Bar Section.

Splendid work was done by the Committees upon the Bureau of Identification, Investigation and Statistics, and concerning Omissions, Conflicts and Inaccuracies in Existing Statutes. These committees were headed by George Etheridge of Meridian, and Ed Brunini of Vicksburg, respectively, and their reports appear in this issue of the Journal. These men are to be congratulated upon the manner in which they have carried out the work of the Junior Bar Section. Their work demonstrates the fact that the Junior Bar Section can be of great service to the Bar and to the state.

The question of adaptation and adoption of the new Federal Rules for the State Courts is of vital interest to Mississippi lawyers and the Committee on this question, headed by Semmes Luckett of Clarksdale, has made a careful study of the question and

rendered assistance in connection with the Institute on such rules, held at the University of Mississippi. The report of the Committee and a statement by its chairman which appear in this issue need no comment. The presentation of this report and its discussion will be of vital interest at the Biloxi meeting.

A real service has been rendered those entering the practice of law in Mississippi by the Committee headed by James N. Ogden of Magnolia, and Edwin White of Lexington. On behalf of the Junior Bar Section it has welcomed those graduating from the University of Mississippi and passing the State Bar examination, offered its services to them, and rendered them assistance in beginning the practice of law.

We hope that there will be a full attendance of the members of the Junior Bar Section at both the afternoon and evening meetings, as the matters which will be presented will be of interest to every member of this Section.

Your Chairman and the Executive Committee have appreciated the trust placed in us by you and again extend our thanks for the wholehearted cooperation which has been shown by the members of this Section who were called upon to aid in the work.

Respectfully,

J. C. Satterfield, *Chairman.*

Report of Code Committee*

To the Members of the Junior Bar Section of the Mississippi State Bar:

The function of this Committee was originally defined as the Committee on Inaccuracies, Omissions and Conflicts in the Code Law. The dividing line between a legislative creative committee and this group is hazy. If we have over-stepped the boundary, your indulgence is respectfully requested.

The scope of this work is unusually extensive. Naturally, therefore, only the surface has been scratched. To enumerate that which has been considered would involve too much time and space. Only our specific recommendations will be submitted. They are as follows:

*The Board of Directors of the Junior Bar Association, realizing the need therefor, immediately after taking office, created a committee to study and recommend changes in the Code law of our state. It was determined that the suggestions of such committee would be presented to the next annual meeting of the Association. Due to the limited period of time available, the committee was requested to print its report in the Mississippi Law Journal so that the members could study and consider the same prior to the convention. Each member of the Junior Bar is urged to bring his copy of this Journal to Biloxi with him so that the discussions may be facilitated.

1.

That the Supreme Court be requested to revise paragraph 1 of Rule 7 so as to read:

> "Appellant's brief shall be filed no later than twenty days before the case is called for argument; appellee's no later than ten days, and any rejoinder brief shall be filed no later than three days before said time. This rule shall not apply where counsel have entered into a written agreement relative to the filings of briefs, but no brief shall be filed after the case has been submitted, except by leave of Court first obtained."

The object is to provide time for appellee's counsel to digest appellant's reply brief before the arguments. It was necessary, in order to do this, that the due dates for each brief be pushed forward.

2.

That Section (f) of Chapter 287 of the General Laws of 1932 be amended so as to read:

> "(f) The acceptance by a non-resident of the rights and privileges conferred by the provisions of this Section, as evidenced by his operating, either personally or by or through an authorized agent, servant or employee, a motor vehicle thereunder, or the operation by a non-resident either personally or by or through an authorized agent, servant or employee, of a motor vehicle on any public street, road or highway in this State other than under said Sections, shall be deemed equivalent to an appointment by such non-resident of the Secretary of State of Mississippi to be his true and lawful attorney upon whom may be served all lawful processes or summons in any action or proceeding against him growing out of any injury or damage in which said non-resident may be involved resulting from operating, either personally or by or through an authorized agent, servant or employee, a motor vehicle on or in connection with such street, road or highway, and said acceptance or operation shall be a signification of his agreement that any such process or summons against him which is so served shall be of the same legal force and validity as if served on him personally. Service of such process or summons shall be made by delivering copy of the process or summons with a fee of two dollars to the Secretary of State, or in his office, and such service shall be service upon said non-resident; provided, that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are filed in the court where such action is pending. The court in which the action is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action. The venue of such actions shall be in the country where the injury or damage occurred, or if a joint action against such non-resident and a resident, then either in the county where said injury or damage occurred or in the county of residence of the resident."

The Act as it now stands provides for jurisdiction only where the owner is actually driving. It can and should be broadened as set out above. Too, the amendment establishes the venue of the action.

3.

That the legislature be requested to repeal Section 5169 of the 1930 Code. This statute has been held unconstitutional and there is no reason to retain it.[1]

4.

That Section 656 of the 1930 Code be amended so as to read as follows:

> "When a suit shall have been commenced the plaintiff or complainant may be required, on motion of the clerk or any party interested, to give security for all costs accrued or to accrue in the suit, within sixty days after an order of the court made for that purpose. *Except for good cause shown, said motion shall be filed on or before the return day of said suit.* If the person making such motion shall make and file an affidavit that the plaintiff or complainant is a non-resident of the state, and has not, as he believes, sufficient property in this state out of which the costs can be made if adjudged against him, or if the plaintiff or complainant be a resident of the state, that he has good reason to believe, and does believe, that such plaintiff or complainant cannot be made to pay the costs of the suit, in case the same shall be adjudged against him; and when the affidavit is made by a defendant that he has, as he believes, a meritorious defense, and that the affidavit is not made for delay, or when made by one not a party defendant that it is not made at the instance of a party defendant. If the security be not given, the suit shall be dismissed and execution issued for the costs that have accrued; but the court may, on cause shown, extend the time for giving such security."

The portion above italicized is the only change made by this amendment.

5.

That the following statute be enacted into law under the Chapter headed "Circuit Courts".

> "The plaintiff may amend his declaration as of course, without applying to the court, at any time before the defendant has made defense, upon plaintiff paying the costs of furnishing a copy of the amendment to all of the defendants. In all other cases amendments can be made only by leave of the court and upon such terms as the court may impose."

This statute is similar to Section 392 providing for amendments in the Chancery Court. The need in the Circuit Court should be apparent.

6.

That Section 354 of the 1930 Code be revised so as to read:

> "The application therefor shall be made in writing by the minor by his next friend, and it shall state the age of such minor and join as defendants his parent or parents then living, or, if neither be living, two of his adult kin within the third degree, computed according to the civil law, and the reasons on which the

[1]See Terral v. Burke Const. Co., 257 U. S. 529 (1922).

removal of disability is sought; and, when such petition shall be filed, the clerk shall issue process as in other suits to make such person or persons parties defendants, which shall be executed and returned as in other cases, and shall make publication for non-resident defendants as required by law, and any person so made a party, or any other relative or friend of the minor, may appear and resist the application."

That Section 355 of the 1930 Code be revised so as to read:

"If the parent or parents then living, or, if they both be not living, if any two of his adult kin within the third degree shall unite with the minor and his next friend in his application, or if the minor has no parent then living and no kindred within the prescribed degree whose place of residence is known to him or his next friend, it shall not be necessary to make any person defendant thereto. But the court shall proceed to investigate the merits of such application, and decree thereon as in other cases."

The judicial history of these two statutes indicate their need of clarification. Under the present statute uncertainty arises as to who must be parties if only one parent is alive. If both parents are dead, then must two of the nearest of kin be joined, or can they be any two within the third degree? Can there be an *ex parte* proceeding if one parent is dead? The recommended change should dispel the needless confusion. Also the revision stipulates that the kin within the third degree shall be *adults*.

7.

Assuming that the above two suggested changes are made, then House Bill No. 262, Chapter 272 of the Laws of 1938 should be revised to read as follows:

"1. When a minor, or person of unsound mind, or a convict of a felony, shall be entitled under a judgment or order or decree of any court, or from any other source, to a sum of money not greater than three hundred dollars ($300.00), or to personal property not exceeding in value that sum, the chancery court of the county of the residence of such minor, or person of unsound mind, or convict of a felony, or the chancery court of the county wherein such person is entitled to such money or property, may order such money or property to be delivered to the minor, or person of unsound mind, or convict of a felony, or to some other person for him if he have no guardian, and compliance with such order shall acquit the person so delivering the same.

"2. Provided, however, that if said sum of money or personal property is not due said minor, or person of unsound mind, or convict of a felony, under a judgment or order or decree of a court, then in that event the chancery court before ordering said money or personal property paid over or delivered as above provided shall fully investigate said matter and shall satisfy itself by evidence, or otherwise, that the proposed sum of money to be paid, either as liquidated or unliquidated damages because of any claim of said minor whatsoever, whether arising *ex delicto* or *ex contractu*, is a fair settlement of the claim of said minor, and that it is to the best interests of said minor that said settlement be made, or that said personal property be delivered to said minor; and thereupon said

chancery court may authorize and decree that said sum of money or personal property be accepted by said minor and paid or delivered by the party owing or having the same, as authorized by the decree of the court, and compliance with such order in the latter event shall acquit the person so paying or delivering the same; and he who under such order shall receive the money or property of a person under such disability shall thereby become amenable to the court for the disposition of it for the use and benefit of the person under disability, but shall not be required to furnish security therefor, unless the chancery court shall so order.

"3. Application for the relief provided for in paragraph 2 hereof shall be made by petition in the manner and with the parties prescribed for the removal of disabilities of minors."

Other than the division of the Act into paragraphs, paragraph 3 of the above is the only change made by the revision.

8.

That Section 323 of the 1930 Code be revised so as to read:

"Whenever it shall appear by petition to the chancery court, or chancellor in vacation, that any bond given by an assignee, receiver, executor, administrator, guardian, or trustee is in excess of the value of the estate being administered, and as such is an unnecessary expense to the estate, the chancery court or chancellor in vacation may after five days service of copy of said petition on the surety, cancel the bond or reduce the same to an amount sufficient to protect the estate."

The present statute is indefinite and should be corrected as above outlined for the sake of clarity.

9.

That the following statute should be enacted into law by the legislature:

"Be it enacted that the Highway Safety Engineers shall ascertain, survey and specify all dangerous curves and hills and shall so mark same by causing to be painted a yellow line in the center of all hard surface roads at such designated points. And it shall be unlawful to pass any moving vehicle going in the same direction at these points. If a motorist pass another moving vehicle, going in the same direction and pull over and cross such yellow line, he shall be punished in the following manner.

First offense a mandatory fine of twenty-five dollars. The second offense a mandatory fine of fifty dollars and the third offense or each offense thereafter a mandatory fine of fifty dollars and fifteen (15) days imprisonment in the jail of the county where the offense occurred."

It was the thought that the above provision would add materially to the safety of the traveling public by eliminating as far as possible the exercise of the sometimes faulty judgment of automobile drivers on hills and curves. Similar statutes in other states have met with reasonable success.

10.

That Sections 1413 and 3566 be repealed and in their stead the following enacted into law:

"Sec. 1. As used in this Act: (1) the term 'slayer' shall mean any person who wilfully and unlawfully takes or procures to be taken the life of another; (2) the term 'decedent' shall mean any person whose life is so taken; (3) the term 'property' shall include any real and personal property and any right or interest therein.

"Sec. 2. Neither the slayer nor any person claiming through him shall in any way acquire any property or receive any benefit as the result of the death of the decedent, but such property shall pass as provided in the sections following.

"Sec. 3. The slayer shall be deemed to have predeceased the decedent as to property which would have passed from the estate of the decedent to the slayer under the statutes of descent and distribution or have been acquired by dower, by curtesy, or by statutory right as surviving spouse.

"Sec. 4. The slayer shall be deemed to have predeceased the decedent as to property which would have passed to the slayer by devise or legacy from the decedent, except that Section 3553 of the 1930 Code shall not apply.

"Sec. 5. One half of property held by the slayer and the decedent as tenants by the entirety shall pass upon the death of the decedent to his estate, and the other half shall be held by the slayer during his life subject to pass upon his death to the estate of the decedent.

"Sec. 6. (a) One half of any property held by the slayer and the decedent as joint tenants, joint owners or joint obligees shall pass upon the death of the decedent to his estate, and the other half shall pass to his estate upon the death of the slayer, unless the slayer obtains a separation or severance of the property or a decree granting partition.

"(b) As to property held jointly by three or more persons, including the slayer and the decedent, any enrichment which would have accrued to the slayer as a result of the death of the decedent shall pass to the estate of the decedent. If the slayer becomes the final survivor, one half of the property shall immediately pass to the estate of the decedent, and the other half shall pass to his estate upon the death of the slayer, unless the slayer obtains a separation or severance of the property or a decree granting partition.

"(c) The provisions of this section shall not affect any enforceable agreement between the parties or any trust arising because a greater proportion of the property has been contributed by one party than by the other.

"Sec. 7. Property in which the slayer holds a reversion or vested remainder and would have obtained the right of present possession upon the death of the decedent shall pass to the estate of the decedent during the period of the life expectancy of the decedent if he held the particular estate, or if the particular estate is held by a third person it shall remain in his hands for such period.

"Sec. 8. Any interest in property, whether vested or not, held by the slayer subject to be divested, diminished in any way or ex-

tinguished if the decedent survives him or lives to a certain age, shall be held by the slayer during his lifetime or until the decedent would have reached such age but shall then pass as if the decedent had died immediately thereafter.

"Sec. 9. As to any contingent remainder or executory or other future interest held by the slayer subject to become vested in him or increased in any way for him upon the condition of the death of the decedent: (1) if the interest would not have become vested or increased if he had predeceased the decedent, he shall be deemed to have so predeceased the decedent; (2) in any case, the interest shall not be vested or increased during the period of the life expectancy of the decedent.

"Sec. 10. (a) As to any exercise in the will of the decedent of a power of appointment in favor of the slayer, the slayer shall be deemed to have predeceased the decedent and the appointment to have lapsed.

"(b) Property held either presently or in remainder by the slayer subject to be divested by the exercise by the decedent of a power of revocation or a general power of appointment shall pass to the estate of the decedent; and property so held by the slayer subject to be divested by the exercise by the decedent of a power of appointment to a particular person or persons or to a class of persons shall pass to such person or persons or in equal shares to the members of such class of persons, exclusive of the slayer.

"Sec. 11. (a) Insurance proceeds payable to the slayer as the beneficiary or assignee of any policy or certificate of insurance on the life of a decedent or as the survivor of a joint life policy shall be paid to the estate of the decedent, unless the policy or certificate designates some person not claiming through the slayer as alternative beneficiary to him.

"(b) If the decedent is beneficiary or assignee of any policy or certificate of insurance on the life of the slayer, the proceeds shall be paid to the estate of the decedent upon the death of the slayer, unless the policy names some person other than the slayer or his estate as alternative beneficiary, or unless the slayer by naming a new beneficiary or assigning the policy, performs an act which would have deprived the decedent of his interest in the policy if he had been living.

"(c) No insurance company shall be subject to liability on any policy on the life of the decedent procured and maintained by the slayer or on which all the premiums were paid by him.

"Sec. 12. Any insurance company making payment according to the terms of its policy or any bank or other person performing an obligation for the slayer as one of several joint obligees shall not be subjected to additional liability by the terms of this Act if such payment or performance is made without notice of circumstances tending to bring it within the provisions of this Act.

"Sec. 13. The provisions of this Act shall not affect the rights of any person who, before the interests of the slayer have been adjudicated, purchases from the slayer for value and without notice property which the slayer would have acquired except for the terms of this Act; but all proceeds received by the slayer from such sale shall be held by him in trust for the persons entitled to the property under the provisions of this Act, and the slayer shall also be

liable both for any portion of such proceeds which he may have dissipated and for any difference between the actual value of the property and the amount of such proceeds.

"Sec. 14. The record of his conviction of having wilfully and unlawfully killed the decedent shall be admissible in evidence against a claimant of property in any civil action arising under this Act.

"Sec. 15. This Act shall not be considered penal in nature, but shall be construed broadly in order to effect the policy of this state that no person shall be allowed to profit by his own wrong.

"Sec. 16. If any provision of this Act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable."

Space and time do not permit the enumeration of the many reasons for the passage of this law. An analysis of the many difficulties involved in our present laws show the real necessity for improvement.[2]

11.

The following should be enacted into law and inserted in the Chapter in the Code designated "Provisions Common to Courts":

"Where an action is brought in any circuit, chancery, county, or justice of the peace court of this state, of which the court in which it is brought has jurisdiction of the subject matter, but lacks venue jurisdiction, such action shall not be dismissed because of such lack of proper venue, but on objection on the part of the defendant shall, by the court, be transferred to the venue to which it belongs."

This statute should be quite helpful.[3]

12.

In view of the decision of our Supreme Court rendered in 1932 in the case of *Hayes et al v. Federal Land Bank et al*,[4] some provision should be made for the making of final records in proceedings for the removal of disabilities of minors, *etc.*

The opinion of the Supreme Court in the case above referred to invalidates statutory proceedings where the petition is lost. By revising Section 347 of the 1930 Code to include suits of all kinds and also to permit the making of final records at any time even though years have passed since the final determination of such suits, interested parties can protect themselves from the dangers occasioned by the ruling in the *Hayes* case, *supra*. The Committee recommends that Section 347 be revised so as to read:

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[2]See Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution* (1936) 49 HARV. L. REV. 715 for a discussion of the above Act.

[3]Brashier v. O'Connor, 181 Miss. 872, 180 So. 67 (1938); GRIFFITH, MISSISSIPPI CHANCERY PRACTICE (1925) §§ 156, 157, 158.

[4]162 Miss. 877, 140 So. 340 (1932).

> "The clerk shall, within three months after the final termination of each suit involving real estate, record all the pleadings, proofs, exhibits and proceedings therein, or such part thereof as may be required by order of the chancellor, in a book to be kept for that purpose, and to be styled "The Book of Final Records in Chancery". He shall likewise make a final record of all other proceedings or suits, if required by the decree or by order of the chancellor, omitting such portions from the record-books as the chancellor may direct. The clerk shall also make final record of all or such portions of a former terminated proceeding or suit as may be requested by any person, upon payment by such person of the cost thereof."

Your Committee wishes to make known that it has under consideration, among other suggestions, the following:

(a) Revision of the Chapter entitled "Trial of Right to Property";

(b) Revision and correlation of the Chapters on "Unlawful Entry and Detainer", "Ejectment", "Landlord and Tenant" and their supplementary statutes;

(c) Clarification of procedure on Appeals from the County Court;

(d) Method and limitations on appeals of persons *non compos mentis*;

(e) Revision of Marriage, Divorce and Annulment Laws;

(f) Revision of Laws of Adoption.

As can be seen such projects necessitate exhaustive study. It has not been possible, within the short time allotted, to complete the same. Until supplanted, the Committee will continue to function on these problems.

In conclusion, it is our judgment that the Junior Bar Directors should make this a permanent committee. The personnel thereof, however, should be changed from year to year due to the amount of work the members are required to perform. When the time comes—and it should not be too far off—for a new Code, the work we are now doing, and will do in the future, should be of valuable assistance.

Respectfully submitted,

E. L. Brunini, *Chairman.*

Report of Committee on a Bureau of Identification, Investigation and Statistics in Mississippi

To the Members of the Junior Bar Section of the Mississippi State Bar:

Your committee on a Bureau of Identification, Investigation and Statistics for Mississippi appointed by the Chairman of the

Junior Bar Section of the Mississippi State Bar submits the following report:

Your Committee has carefully considered the bill to establish the Bureau referred to and with a few clarifying changes found the same to be entirely satisfactory and recommends it to the Junior Bar Section, and requests that the same be enacted into law by the legislature of the state.

In accordance with your instruction this committee, after a thorough study of the bill, has presented the same to numerous civic groups and to the officials who would be interested in such legislation; it has also obtained the publication of a number of news items and editorials with reference to this proposed legislation and has communicated with all of the announced candidates for governor, sending them a copy of the bill, and has received either complete or qualified approval from all such candidates.

Your Committee conferred with Governor Hugh L. White during the extraordinary session of the Mississippi Legislature in 1938 in an attempt to have him present this matter, and more particularly this bill, to the extra session for consideration. This meeting was attended by the Junior Bar Committee and the State Junior Chamber of Commerce Committee on this subject. We are pleased to report that Governor Hugh White, Hon. Greek Rice, Attorney General, and several of the assistant attorney generals were favorably impressed with this proposed bill and enthusiastic in expressing the necessity for such in our state. Governor White said that legislative matters were rushed at that session but that if, by chance, another extra session was called he would consider the possibility of presenting this bill at that time.

The chairman of your Committee has been in contact throughout this entire time with the members of the Committee by correspondence. He has forwarded to each member the very excellent discussion of the bill written by Hon. Walker Broach, together with a copy of the bill, and suggested that same be used by the respective members in their sections of the state. The correspondence in this regard is attached to this report for the consideration of the Junior Bar Section and it is considered that such correspondence is very informing as to the attitude, ideas, and activities of your Committee.

In the opinion of your Committee this is a most worthwhile project we have undertaken, and such a department would be beneficial to the entire populace of our state, saving those who thrive from the large profits of organized crime. Your Committee feels it to be their duty to present now a brief synopsis of the provisions of the proposed bill. This bill was drafted by Hon. Walker Broach as a proposed bill for the creation of a State Bureau of Criminal

Identification, Investigation and Statistics. This bill was taken, redrafted, and presented to the 1936 session of the Mississippi Legislature by your chairman. In the beginning it was adapted from a model act proposed by the committee on Uniform Crime Records of the International Association of Chiefs of Police, which model bills had been drafted by some of the best minds of our nation. This proposed act in its present form is therefore largely an adaptation to our local needs of this model bill and tends to take full advantage of the facilities of our state which are already in existence.

Your Committee realizes that it was immediately felt by parties interested in this department that it should be absolutely divorced from politics and that unless this were done, the proposed legislation would create more harm than good. Accordingly, we note that it is proposed that all employees and investigators of the bureau shall be under regulations similar to Civil Service and such would be prescribed by the superintendent of the bureau. It is further provided that employees shall only be subject to discharge for cause and not by reason of political whims or desires on the part of anyone. The present bill in question provides that the Board of Control shall consist of the Attorney General, together with the seventeen District Attorneys of the state, and one sheriff and one police chief to be appointed by the governor, which committee in turn selects a superintendent who must be acceptable and approved both by the governor of the state as well as the senate.

Quoting from Hon. Walker Broach: "The sponsors of this bill had no idea that the district attorneys would be above politics any more than any other officers, but it was felt that a board composed of all of these officers with their varying political opinions and beliefs would largely counteract each other, and thus the selection of a superintendent of the bureau might be kept out of politics more than if appointed by one particular person. However, it may well be that it would be better for the superintendent to be appointed directly by the governor, but this is a detail which can be easily worked out later."

Your Committee is of the opinion in this regard that the provision of the bill should be followed in the introduction of same in the legislature.

The bill provides for all departments that were, are now, or will be later needed or required, being as follows:

A. Chemical Analysis

B. Department of Ballistic Experts

C. Finger Printing Department

D. A Competent Medical Staff

E. An Auditing and Accounting Department

and such other departments and employees as shall be prescribed by said Board of Control, subject to the limitations of any appropriation made for the carrying out the purposes of this act.

It further provides for the report from the various counties of the state of vital criminal statistics and for the voluntary taking of finger prints as well as finger print files from our various institutions for the insane and other state institutions.

It provides further for central communication facilities and for the general organization and administration by the Board for the department. As mentioned aforesaid, the purpose of the Board of Control is to make the Act as free from political concerns as possible. It is felt that the Board of Control as set up, headed by the Attorney General and thus the district attorneys representing the varying sentiments over the state, would be less apt to be swayed by political concerns than would any one man who had lodged within himself the power of the board. Certainly with seventeen representatives from all parts of the state political beliefs of its various members should result in off-setting each other, and further in this regard, particularly does it provide that no officer or superintendent of the bureau shall be allowed to hold or be candidate for any public office nor engage in campaigning for any candidate. Also no officer or investigator of this bureau shall be permanently stationed for duty in any one Circuit Court District or any one particular district, county, or section of the state of Mississippi for a longer period of time than six months. The Board of Control shall provide for the shifting of the officers and employees of this bureau from one district to another to prevent such.

The bill provides that the facilities of the University of Mississippi and Mississippi State College may be used by the Bureau or that such facilities as the chemical or medical departments of such colleges may be called upon to act in lieu of certain departments by the bureau.

It is apparent that at the present time there will probably be no necessity for the creation of all of the departments provided for in the proposed bill. This contingency is therefore provided for by the provision that the Board of Control shall have the power to either create or not create such departments as are provided, and the legislature is given immediate control over this matter by reason of its power to restrict necessary appropriations. The bill is flexible in its provisions, subject to the discretion of legislative appropriations, and the administration by its Board of Control is drawn in such a manner that amendatory legislation will not be

necessary, as the necessity of the state increases the need for the additional facilities which the Board may provide. Your Committee believes that the Board could successfully operate in a skeletonized form in the outset by taking advantage of the present facilities of the colleges and other facilities that might already be available.

Your Committee desires to stress a particular provision of the bill as being of vital importance to the success of such a bureau. It provides that the activities of the state bureau shall not supersede any local governmental agency or officer or any local authority now granted to the respective local governmental agencies or officers. The mere additional aid and benefit of scientific facilities and detailed and trained investigators for such local authorities and subject to the call of local authorities for assistance, shall at all times maintain the proper rights and privileges of the local authorities. It is your Committee's opinion that such a bureau would provide supplemental service to aid in the tireless vigilance of under-staffed local authorities.

This bureau would also be in a position to render such service in attacking the traffic in marihuana cigarettes and other dope, drug, and narcotic law violations. For an example as stated by Hon. Walker Broach in his discussion: "In 1934 the Mississippi Legislature passed a bill for the suppression of marihuana and other narcotics, an act which has no peer in this nation, but again a splendid piece of legislation was placed upon our books without adequate machinery for its enforcement. The Federal investigators are overworked in the handling of these various problems and it is primarily a problem of state concern. The dealing with this problem and off-setting of the critical dangers that are evident would more than repay the State of Mississippi for the creation of the bureau proposed."

Your Committee desires to quote further from Hon. Walker Broach as follows: "Therefore will you permit me finally to say that this problem which I discussed with you today is not merely a problem for still another bureau to be created for further political patronage. In fact, even with the obvious necessity therefor, I would hesitate to suggest the creation of this bureau if I were not convinced in my own mind that it would result in saving instead of loss. No one realizes more fully than the speaker that we cannot afford to do anything that will increase the expenses of government, but I earnestly believe that the creation of this bureau will result in the saving of many thousands of dollars to our citizens instead of merely adding to their already great load of taxation."

Your Committee submits herewith a list of the larger items which would be necessary toward opening the bureau, said list being attached hereto. We believe that it would be possible to

cut down on this expense in the infancy of the bureau and feel sure that it would not cripple or effect the possible advantages to be derived.

One can better understand the outstanding advantages of the particular proposed bill after reading same. Therefore, it is your Committee's desire to present a copy of this bill to every member of the Bar Association at an early date.

As to the need for this bureau other than expressed above, your Committee hesitates to discuss same for fear that the report might be lengthened too much. However, for the purpose of this record we wish to say that Mississippi leads the nation in its homicide rate based upon *per capita* population. In the year 1935 in our state there was one county with the same number of homicides as the states of New Hampshire, Nevada, and Maine combined. And for fear that anyone might feel that organized crime, its depredations, its tolls, and its penalties are only restricted to the larger cities of this nation, we ask you to look around your immediate vicinities and there you will find the refutation of any such assumption. Organized crime is no longer restricted to metropolitan areas. It has and does enter every town, village, and hamlet in this nation and this irrespective of any geographical location.

It is, therefore, in the light of this very real problem with which we are faced in the State of Mississippi and considering all other premises in this regard, that your Committee has performed the work up to now and that we make the following recommendations to the Junior Bar Section:

1. That the Junior Bar Section of the Mississippi State Bar accept and approve the report of this Committee.

2. That the Junior Bar Section endorse this bill in its present form for presentation to the next session of the Mississippi Legislature by an appropriate resolution in its next regular meeting.

3. That the Junior Bar Section continue its present committee —not necessarily with the same personnel—but to be left to the discretion of the Chairman of the Section; that this Committee be clothed with the duty and responsibility of presenting this matter to the 1940 legislature or an earlier session if possible, and to expend funds available and necessary for the expenses of its members urging passage of the bill; and further that the Committee be authorized to take procedure in popularizing the proposed legislative bill as aforesaid to the individual legislators, the general public and any other interested parties, bodies or organizations.

4. That the Junior Bar Section present in the form of a recommendation to the Mississippi Bar a resolution authorizing

the president of the State Bar to appoint a committee of its members to be from the various sections of our state, to perform the same duties as the Junior Bar Committee on this subject and to cooperate therewith in urging the passage of this proposed bill.

Respectfully submitted,

Geo. M. Etheridge, Jr., *Chairman.*

Report of Committees on Cooperation with Young Lawyers

To the Members of the Junior Bar Section of the Mississippi State Bar:

Your Committees on Cooperation with Young Lawyers respectfully submit the following as their report:

This Committee held a conference and discussion group with members of the senior class of the University of Mississippi and the members of the faculty which included general suggestions for prospective lawyers and discussion of methods of assisting them in finding locations in which to commence practice. This discussion group was very successful.

This Committee wrote a letter of welcome to each person who passed the State Bar examination in July, 1938, and offered the services of the Junior Bar Section to them; the Committee compiled data with reference to the opportunities for the practice of law, population, assessed valuation, agricultural and manufactured products, and other pertinent information concerning the counties in the state for the information of those commencing the practice of law.

Your Committee plans to get in touch with the graduates of the University of Mississippi this spring and those who pass the State Bar examination to welcome them and offer the assistance of the Committee.

The Committee is contacting the chancellors and circuit judges of the state with the view to finding possible openings for young lawyers, in order that such information may be passed to those beginning practice. The Committee is also writing to the departments of the state government and the federal agencies, and other institutions which may be interested, calling their attention to the high type of legal training of the University of Mississippi Law School and the Jackson School of Law.

We recommend that this committee be made a permanent Committee of the Junior Bar Section, subject to the usual changes of personnel of such permanent committees, and that the same cooperate with the similar committee of the Junior Bar Conference

of the American Bar Association which may be able to render valuable assistance.

Respectfully submitted,

James N. Ogden, *Chairman Section "A".*

Edwin White, *Chairman Section "B".*

REPORT OF COMMITTEE ON PLEADING, PRACTICE AND PROCEDURE

To the Executive Committee of the Junior Bar Section of the Mississippi State Bar:

Your Committee to recommend improvements in present court practice and procedure and especially examine the federal rules to determine whether those rules can be adapted for use in Mississippi, makes the recommendations following:

1.

The new federal rules of procedure can be adapted for use in Mississippi, and if adapted, will greatly improve and benefit our present court practice and procedure.

2.

Our present court practice and procedure cannot be amended or changed in piecemeal so as to make the whole a workable scheme, but the same should be superseded in its entirety by the new federal rules of practice and procedure.

Respectfully submitted,

Semmes Luckett, *Chairman.*

REPORT OF COMMITTEE TO STUDY THE METHOD OF SELECTION OF THE JUDICIARY

To the Executive Committee of the Junior Bar Section:

Your Committee, composed of David Cottrell, Jr., W. W. Dent, L. Glenn Fant, Jr., J. R. Lobrano, and Charles A. Sisson, is not in agreement. The majority report is as follows:

1.

The method of the selection of the judiciary should be changed.

2.

The majority favors the Wood Plan, which in substance is as follows: The members of the Mississippi State Bar, in the Supreme Court, Chancery Court and Circuit Court Districts, respec-

tively, elect a committee consisting of five members for each district. Each committee shall submit to the governor a list of five lawyers from the respective districts wherein a judgeship is to be filled. The governor shall appoint one from the list submitted to serve as judge of the Supreme Court, Circuit Court or Chancellor, as the case may be. Such appointee shall serve for four years, at the end of which he shall go before the electorate which shall vote whether the incumbent be retained or rejected. If retained, he shall serve for four more years. If rejected, another list of five shall be submitted to the governor, who shall appoint one from this list to serve. The committees in the respective districts shall be elected by secret ballot mailed each member in the district by the Secretary of the Mississippi State Bar. No member of the committee shall be eligible for an appointment to a judgeship.

3.

The majority does not feel that this project should be pushed at this time; but that it should be mentioned at the next meeting of the Junior Bar Section and Mississippi State Bar, so that the members can study the subject and be in a position later to pass upon the question of whether a change should be made.

A strong minority of the committee reports that there should be no change; that the present method of selection can not be improved upon.

Respectfully submitted,

Charles A. Sisson, *Chairman.*

Announcement Concerning the State Bar Convention

The Mississippi State Bar will convene in annual meeting at Biloxi on June 22 and 23 for a program that will bring before the barristers nationally known figures for addresses.

Sessions will be held at the Buena Vista Hotel.

In addition to the principal address, probably the most interesting feature of the program will be the discussion of procedural reforms, which will be led by Judge Webb Venable of Clarksdale.

Hon. R. M. Kelly, president of the State Bar, will preside over the two-day session. The members will be welcomed by Mayor Louis A. Braun of Biloxi and Hon. R. C. Cowan of Gulfport, and Senator John H. Culkin of Vicksburg will deliver the response.

Reports on various phases of the bar will be given by Mr. Coleman Branton, editor of the Mississippi Law Journal; Judge T. C. Kimbrough, Dean of the University Law School; Hon. Marion W. Reily of Meridian, chairman of the Memorial Committee; and Hon. Ben H. McFarland of Aberdeen, Complaint Commissioner.

Hon. Hubert Lipscomb of Jackson, member of the House of Delegates of the American Bar Association, will bring greetings from that organization.

The Junior Bar Section will hold its annual meeting on the afternoon and evening of June 21, with John C. Satterfield of Jackson, Chairman of the Section, presiding. He will report to the general assembly on the activities of the Section at the morning session Friday, June 23.

The Commissioners of the State Bar will meet on Wednesday afternoon, June 21, at 3:30 at the Buena Vista Hotel.

The University of Mississippi Alumni Association will hold its annual luncheon at 12:30, Thursday, June 22nd, with Hon. Hindman Doxey, president of the Alumni, serving as toastmaster.

On Thursday afternoon, June 22, there will be a boat ride to Fort Massachusetts for members and guests, and bridge and tea for visiting ladies who do not care to take the boat ride. Following this the annual banquet will be held at eight o'clock with Judge L. A. Smith of Holly Springs as toastmaster. Ten-minute speeches will be delivered during the banquet by Mrs. Evelyn Hunt Conner, Bay St. Louis; Hon. Earle Wingo, Hattiesburg; Hon. R. C. Stovall, Columbus; Hon. Joe E. Brown, Natchez; Hon. William A. Bacon, Durant; and Hon. W. L. Guice, Biloxi. Immediately after the banquet there will be dancing on the Buena Vista pavilion.

After 2 o'clock Thursday afternoon, all golf courses on the coast will be open to members and guests, and swimming and fishing parties will be arranged for any hour. An automobile ride will be available for the ladies at 9:30 Friday morning.

Election of officers and the selection of the next place of meeting will be held Friday afternoon at 2:00 o'clock.

Arrangements for the annual meeting are being made by the program committee of the State Bar of which Hon. John H. Culkin of Vicksburg is chairman. The other members of the committee are Hon. W. H. Lott, Greenwood; Hon. D. W. Holmes, Jr., Hattiesburg; Hon. W. G. Roberds, West Point; Hon. W. A. Ellis, Carthage; Hon. Lemuel H. Doty, Biloxi; and Hon. R. W. Thompson, Jr., Gulfport. The program is incomplete and more detailed information will be released by Senator Culkin at a later date.

NOTES

The Mississippi Prima Facie Statute Relative to Railroad Accidents

The Mississippi *Prima Facie* Statute[1] might well be called, as another statute has been, "Mississippi's Odd and Confused Statute."[2] This statement has been made with reference to it:

> ". . . . it is one constantly invoked in practice, and . . . . with the possible exception of our so-called two donee statute,[3] there is none in our Code which has caused more reversals."[4]

Judge Ethridge, in commenting on it, has said:

> "The statute . . . . has been construed in numerous cases. In fact, it is the most litigated statute in our jurisprudence."[5]

The problems of construction and application raised by this statute have caused the courts of this state much embarrassment, and the decisions reflect the difficulties of its application. Nor do the decisions of the United States Supreme Court on the questions presented by it seem in complete accord. Both courts seem torn by conflicting policies and changing attitudes. However, it now appears that definite rules concerning its proper use have been settled.

The statute was the subject of a very learned and able discussion in the *Mississippi Law Journal* in 1930,[6] in which certain predictions relative to a change in the construction of the statute were made. It is interesting to note that these predictions were sustained and this article cited with approval in the present leading case interpreting this statute.[7] The statute has elsewhere been the subject of discussion and comment,[8] and its examination

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[1]Miss. Code Ann. (1930) § 1580.

[2]Smith, *Mississippi's Odd and Confused Statute* (1929) 2 Miss. L. J. 228; Gray, The Rule Against Perpetuities (3rd ed. 1915) § 746, n. 1; both of these writers have reference to Miss. Code Ann. (1906) § 2765—since amended and appearing as Miss. Code Ann. (1930) § 2117.

[3]Miss. Code Ann. (1906) § 2765—since amended and appearing as Miss. Code Ann. (1930) § 2117.

[4]Venable, *Mississippi's Prima Facie Statute* (1930) 2 Miss. L. J. 284.

[5]Ethridge, J., in Columbus & G. Ry. v. Duease, 142 Miss. 713, 727, 108 So. 151, 153 (1928).

[6]Venable, *Mississippi's Prima Facie Statute* (1930) 2 Miss. L. J. 384.

[7]New Orleans & G. N. R. R. v. Walden, 160 Miss. 102, 133 So. 241 (1931). This article is also cited in *Developments in the Law—Evidence* (1933) 46 Harv. L. Rev. 1138, 1146, n. 48.

[8]Cooper, *The Federal Employers' Liability Act* (1931) 4 Miss. L. J. 97, 101; (1931) 3 Miss. L. J. 138; (1931) 4 Miss. L. J. 344; Note (1938) 10 Miss. L. J. 305, 315.

is here attempted in order to study the effect of the more recent decisions on the older ones.

This statute first appears in the Code of 1880.[9] It has since been amended several times with the view of bringing other classes of persons within its scope.[10]

The first case involving this statute is that of *Chicago, St. L. & N. O. R. R. v. Packwood.*[11] The plaintiff showed the killing of his horse and rested. The railroad then showed the accident to have been unavoidable, and it was held that the railroad was entitled to a peremptory instruction on the theory of a confession and avoidance. No instruction seems to have been given on the statute, and the result in this case would be the same today.

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[9]MISS. REV. CODE (Campbell, 1880) § 1059.

[10]The section appears unchanged in MISS. CODE ANN. (Thompson, Dillard & Campbell, 1892) § 1808.

The supreme court held that this statute did not apply to those standing in the relation of contract with the railroads. This included shippers, passengers, and employees. Chicago, St. L. & N. O. R. R. v. Trotter, 60 Miss. 442 (1882); Louisville, N. O. & T. R. R. v. Conroy, 63 Miss. 562 (1886); Owen v. Illinois C. R. R., 77 Miss. 142, 24 So. 899 (1899); Yazoo & M. V. R. R. v. Humphrey, 83 Miss. 721, 36 So. 154 (1903); Combs v. Mobile & O. R. R., 92 Miss. 532, 46 So. 168 (1908).

This statute was amended in MISS. CODE ANN. (1906) § 1895 by the addition of these words: "This section shall also apply to passengers and employees of railroad companies." Mobile, J. & K. C. R. R. v. Hicks, 91 Miss. 273, 46 So. 360 (1907); Hudson v. Miss. C. R. R., 95 Miss. 41, 48 So. 289 (1909); Alabama G. S. R. R. v. Hunnicutt, 98 Miss. 272, 53 So. 617 (1910); Hollingshed v. Yazoo & M. V. R. R., 99 Miss. 464, 55 So. 40 (1911); Yazoo & M. V. R. R. v. Messina, 109 Miss. 143, 67 So. 963 (1915); Hill v. Jackson L. & T. Co., 110 Miss. 388, 70 So. 401 (1915); Gulf & S. I. R. R. v. Meyers, 114 Miss. 458, 75 So. 244 (1917); New Orleans & N. E. R. R. v. Scarlett, 115 Miss. 285, 76 So. 265 (1917); Yazoo & M. V. R. R. v. Mullins, 115 Miss. 343, 76 So. 147 (1917); Gulf & S. I. R. R. v. Odum, 133 Miss. 543, 98 So. 60 (1923); Miss. C. R. R. v. Knight, 138 Miss. 621, 103 So. 377 (1925).

Shippers are not required to show negligence in order to recover. Chicago, St. L. & N. O. R. R. v. Trotter, 60 Miss. 442 (1882). But see MISS. CODE ANN. (1930) § 1581.

It was also held that the statute did not apply to injuries by street railways. Pascagoula St. Ry. & P. Co. v. Brondum, 96 Miss. 28, 50 So. 97 (1909). But the statute was again amended by Miss. Laws 1912, c. 215 so that it applies to this class of suits as well. Hill v. Jackson L. & T. Co., 110 Miss. 388, 70 So. 401 (1915).

The statute now applies to ". . . . all actions against railroad corporations, and all other corporations, companies, partnerships and individuals using engines, locomotives, or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or level power, and running on tracks . . . ." MISS. CODE ANN. (1930) § 1580.

The statute was then brought forward in MISS. CODE ANN. (Hemingway, 1917) § 1645, (adopted as official, Miss. Laws 1922, c. 286). It again appeared in MISS. CODE ANN. (Hemingway, 1927) § 1717, and finally in MISS. CODE ANN. (1930) § 1580.

[11]51 Miss. 280 (1881). Accord: Louisville, N. O. & T. Ry. v. Tate, 70 Miss. 348, 12 So. 333 (1892).

In the next case arising under the statute,[12] the verdict of the jury for the plaintiff was upheld because the evidence of the railroad company was in conflict with the physical circumstances shown by the plaintiff's evidence. No instruction appearing to have been given in this case, its result would also seem correct under the present doctrine.

The pendulum of judicial thought and expression then swung back and forth with varying interpretations of the statute[13] for a number of years. In 1913 the Supreme Court, speaking through Chief Justice Smith, decided the case of *Alabama & V. Ry. v. Thornhill*[14] which at once became the leading case on the subject. In this case the court attempted to lay down in numerical order, certain rules governing the application of the statute. For reasons of convenience these rules will be considered here in an order different from that in which they were considered by the court.

This *Thornhill* case continued to be the leading case[15] on the statute until 1931, when the court decided the case of *New Orleans*

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[12]New Orleans, M. & T. R. R. v. Toulme, 59 Miss. 284 (1881). Accord: Ross v. Natchez, J. & C. R. R., 62 Miss. 23 (1884); Kansas C., M. & B. R. R. v. Doggett, 67 Miss. 250, 7 So. 278 (1889); Baird v. Georgia P. R. R., 19 So. 661 (Miss. 1896); Illinois C. R. R. v. Greaves, 75 Miss. 360, 22 So. 804 (1897).

[13]The case of Vicksburg & M. R. R. v. Phillips, 64 Miss. 693, 2 So. 537 (1887) seems to have been the cause of the major conflicts in judicial expression. In the case this statement is made: "When the facts appear, no matter how, it is a question determinable from them whether or not there was want of reasonable skill and care in the case." *Id.* at 704, 2 So. at 539. And then we find: "It cannot be said to be erroneous to instruct the jury that the law presumes wrong and imputes blame from the fact of injury inflicted by the running of locomotives or cars for that is precisely what Sec. 1059 does." *Id.* at 704, 2 So. at 539.

The case of Louisville, N. O. & T. Ry. v. Smith, 67 Miss. 15, 7 So. 212 (1889) is *contra* to the cases of Owen v. Illinois C. R. R., 77 Miss. 142, 24 So. 899 (1899); Nichols v. Gulf & S. I. R. R., 83 Miss. 126, 36 So. 192 (1903); Korta v. Gulf & S. I. R. R., 87 Miss. 482, 40 So. 258 (1905); So. Ry. v. Murray, 91 Miss. 546, 44 So. 785 (1907); Fuller v. Illinois C. R. R., 100 Miss. 705, 56 So. 783 (1911).

See also the following cases: Mobile & O. R. R. v. Holt, 62 Miss. 170 (1884); Vicksburg & M. R. R. v. McGowan, 62 Miss. 682 (1885); Illinois C. R. R. v. Turner, 71 Miss. 402, 14 So. 450 (1893); Roberds v. Mobile & O. R. R., 74 Miss. 334, 21 So. 10 (1896); Mitchell v. New Orleans & N. E. R. R., 36 So. 1 (Miss. 1904); Young v. Illinois C. R. R., 88 Miss. 446, 40 So. 870 (1906); Crawford v. St. Louis & S. F. R. R., 102 Miss. 269, 59 So. 86 (1912).

[14]106 Miss. 387, 63 So. 674 (1913).

[15]Miss. C. R. R. v. Robinson, 106 Miss. 896, 64 So. 838 (1914); Alabama G. S. Ry. v. Daniell, 108 Miss. 358, 67 So. 730 (1914); Yazoo & M. V. R. R. v. Messina, 109 Miss. 143, 67 So. 963 (1915); Hill v. Jackson L. & T. Co., 110 Miss. 388, 70 So. 401 (1915); Hamel v. So. Ry., 133 Miss. 344, 74 So. 276 (1917); Illinois C. R. R. v. Gray, 118 Miss. 612, 79 So. 812 (1918); Hines v. McCullers, 121 Miss. 666, 83 So. 734 (1920); Bonds v. Mobile & O. R. R., 125 Miss. 547, 88 So. 161 (1921); Davis v. Elzey, 126 Miss. 789, 88 So. 630 (1921); Davis v. Temple, 129 Miss. 6, 91 So. 689 (1922); Gulf, M. & N. R. R. v. Brown, 138 Miss. 39, 102 So. 855 (1925); Miss. C. R. R. v. Knight, 138 Miss. 621, 103 So. 377 (1925); Gulf, M. & N. R. R. v. Hudson, 142 Miss. 542, 107 So. 639 (1926); Columbus & G. Ry. v. Duease, 142 Miss. 713, 108 So. 151

& G. N. R. R. v. Walden.[16] In this case certain of the rules laid down in the *Thornhill* case were expressly overruled, and other of the rules expressed therein must be considered in the light of the decision of the *Walden* case. In any consideration of the present rules of application governing the statute these two cases must be considered together.

There is also another case which must be examined in this regard. This is the case of *Mobile, J. & K. C. R. R. v. Turnipseed,*[17] in which the railroad attacked the constitutionality of the statute in the Supreme Court of the United States. The statute was upheld in this case, but because of subsequent decisions of the same court,[18] this decision is of vital importance.

In 1883, in the fourth case[19] arising under the statute, we find the beginning of the doctrine that the presumption created by the statute is a general one (general, in the sense of comprehensive). In other words, it is held that the railroad must introduce evidence on all particulars in which negligence on its part might have substantially contributed to the plaintiff's injury.[20] It would seem that this idea that the presumption is a general one might possibly furnish the explanation[21] for the use of the language in many of the decisions of the court, that the defendant must "exculpate" itself from negligence to the "satisfaction" of the jury.[22] The rule is stated as the third rule of the *Thornhill* case:

(1926); Columbus & G. Ry. v. Lee, 149 Miss. 543, 115 So. 782 (1928); Columbus & G. Ry. v. Fondren, 154 Miss. 40, 121 So. 838 (1929).

See also the following cases: Alabama & G. S. R. R. v. Carney, 103 Miss. 322, 68 So. 166 (1915); Illinois C. R. R. v. Reed, 113 Miss. 545, 74 So. 423 (1917); Gulf & S. I. R. R. v. Prine, 118 Miss. 90, 79 So. 62 (1918); Gulf & S. I. R. R. v. Boone, 120 Miss. 632, 82 So. 335 (1919); Gulf, M. & N. R. R. v. Jones, 137 Miss. 631, 102 So. 385 (1925); Grantham v. Gulf & S. I. R. R., 138 Miss. 360, 103 So. 131 (1925); Allman v. Gulf & S. I. R. R., 149 Miss. 489, 115 So. 594 (1928).

[16]160 Miss. 102, 133 So. 241 (1931).

[17]219 U. S. 35 (1910).

[18]Western & A. R. R. v. Henderson, 279 U. S. 639 (1929); Seaboard A. L. Ry. v. Watson, 287 U. S. 86 (1932); Atlantic C. L. R. R. v. Ford, 287 U. S. 502 (1932).

[19]Mobile & O. R. R. v. Dale, 61 Miss. 206 (1883).

[20]Drake v. Yazoo & M. V. R. R., 79 Miss. 84, 29 So. 788 (1901); Alabama & V. Ry. v. Thornhill, 106 Miss. 387, 63 So. 674 (1913); Miss. C. R. R. v. Robinson, 106 Miss. 896, 64 So. 838 (1914); Illinois C. R. R. v. Gray, 118 Miss. 612, 79 So. 812 (1918); Gulf, M. & N. R. R. v. Hudson, 142 Miss. 542, 107 So. 639 (1926).

[21]Smith, C. J. attempts an explanation in the cases of Alabama & V. Ry. v. Thornhill, 106 Miss. 387, 63 So. 674 (1913) and Alabama G. S. Ry. v. Daniell, 108 Miss. 358, 66 So. 730 (1914), on the ground that the questions presented in cases in which that language appears was the propriety of the trial court's ruling on the request for a directed verdict.

[22]Vicksburg & M. R. R. v. Hamilton, 62 Miss. 503 (1885); Louisville, N. O. & T. R. R. v. Conroy, 63 Miss. 562 (1886); Vicksburg & M. R. R. v. Phillips, 64 Miss. 693, 2 So. 537 (1887); Louisville, N. O. & T. Ry. v. Smith, 67 Miss. 15, 7 So. 212 (1889); Louisville, N. O. & T. Ry. v. Hirsch, 69 Miss. 126, 13 So.

> "(3) This *prima facie* presumption, however, is not a specific but a general one; that is, negligence is presumed in the doing or omission of any act that could have reasonably caused the injury, and consequently, in order that it may be rebutted, the evidence must disclose the doing or omission of every act from the doing or omission of which an inference of negligence *vel non* could be drawn."[23]

This rule is not discussed in the *Walden* case and it would seem that it must be considered with the rule there stated:

> "'. . . .the peculiar effect of a presumption of law . . . . is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule.' For this parenthetical clause we would substitute the words 'sufficient *prima facie* to rebut it.' "[24]

The *Turnipseed* case tells us that:

> "The only legal effect of this inference is to place upon the railroad company the duty of producing some evidence to the contrary."[25]

It would seem to require no argument that before the requirement that the defendant introduce "some evidence" is fulfilled, evidence must be introduced on each specific particular in which the defendant might have been guilty of negligence proximately causing

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244 (1891); Louisville, N. O. & T. Ry. v. Bonner, 14 So. 462 (Miss. 1893); Hamlin v. Yazoo & M. V. R. R., 72 Miss. 39, 16 So. 877 (1894); So. Ry. v. Hays, 78 Miss. 319, 28 So. 939 (1900); New Orleans & N. E. R. R. v. Brooks, 85 Miss. 269, 38 So. 40 (1904); Yazoo & M. V. R. R. v. Landrum, 89 Miss. 399, 42 So. 675 (1906); Pascagoula St. Ry. & P. Co. v. Brondum, 96 Miss. 28, 50 So. 97 (1909); Easley v. Alabama G. S. R. R., 96 Miss. 396, 50 So. 491 (1909); Alabama & G. S. R. R. v. Hunnicutt, 98 Miss. 272, 53 So. 617 (1910); Fuller v. Illinois C. R. R., 100 Miss. 705, 56 So. 783 (1911); New Orleans, M. & C. R. R. v. Cole, 101 Miss. 173, 57 So. 556 (1911); Alabama & V. Ry. v. Thornhill, 106 Miss. 387, 63 So. 674 (1913); Alabama G. S. Ry. v. Daniell, 108 Miss. 358, 66 So. 730 (1914); Yazoo & M. V. R. R. v. Messina, 109 Miss. 143, 67 So. 963 (1915); Hamel v. So. Ry., 133 Miss. 344, 74 So. 276 (1917); Illinois C. R. R. v. Gray, 118 Miss. 612, 79 So. 812 (1918); Gulf & S. I. R. R. v. Boone, 120 Miss. 632, 82 So. 355 (1919); Davis v. Elzey, 126 Miss. 789, 88 So. 630 (1921); Gulf, M. & N. R. R. v. Jones, 137 Miss. 631, 102 So. 385 (1925); Gulf, M. & N. R. R. v. Brown, 138 Miss. 39, 102 So. 855 (1925); Columbus & G. Ry. v. Duease, 142 Miss. 713, 108 So. 151 (1926); Eastman Gardiner & Co. v. Sumrall, 160 Miss. 792, 133 So. 212 (1931).

[23]Alabama & V. Ry. v. Thornhill, 106 Miss. 387, 409, 63 So. 674, 678 (1913).

[24]New Orleans & G. N. R. R. v. Walden, 160 Miss. 102, 109, 133 So. 241, 243 (1931), quoting 5 WIGMORE, EVIDENCE (2nd ed. 1923) § 2491.

[25]Mobile, J. & K. C. R. R. v. Turnipseed, 219 U. S. 35, 43 (1910).

the injury. If this is not done, the case would seem to remain in the same state as if the defendant had introduced no evidence at all. Thus the first rule of the *Thornhill* case that:

> "(1) Proof of injury inflicted by the running of defendant's cars is *prima facie* evidence of negligence, and, unexplained, entitles the plaintiff to judgment,"[26]

would find application and the plaintiff would be entitled to a peremptory instruction on liability.

The fourth rule of the *Thornhill* case is in accord with the general rule in all classes of cases, and it would appear, has its roots in the fundamentals of our judicial system rather than in any statute. It reads as follows:

> "(4) When the facts and circumstances are in evidence, and there is no dispute relative thereto, and it appears that only one reasonable inference can be drawn therefrom, a verdict may be directed for either the plaintiff or the defendant as the case may be."[27]

The rules of the *Thornhill* case are merely declaratory of what had already been said in other cases on the statute; and while the restatement of such a universal rule as this one may seem superfluous, this rule is helpful in the clarification of the statute.

There seems never to have been any conflict in the decisions of the court on the second rule laid down in the *Thornhill* case. This rule is as follows:

> "(2) When the facts and circumstances under which the injury was inflicted have been ascertained, the presumption of negligence created by the statute disappears, and the defendant's negligence *vel non* must then be determined alone from such facts and circumstances."[28]

However, the rule has been subject to certain limitations in the way of instructions to the jury which in practical effect nullified its operation.[29] One of these limitations is the fifth rule of the *Thornhill* case, reading as follows:

> "(5) Even though the facts and circumstances are in evidence, and although there may be no conflict therein as to what these facts and circumstances are, unless they justify the court in directing a verdict, it is proper to charge the jury on request of the plaintiff that proof of injury by the running of the cars is *prima facie* evidence

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[26]Alabama & V. Ry. v. Thornhill, 106 Miss. 387, 409, 63 So. 674, 678 (1913).
[27]*Ibid.*
[28]*Ibid.*
[29]New Orleans & G. N. R. R. v. Walden, 160 Miss. 102, 133 So. 241 (1931).

> of negligence, and on request of defendant that, since the facts and circumstances under which the injury was inflicted are known, they will determine whether or not the defendant was negligent solely therefrom without resorting to any presumption of negligence."[30]

The other limitation is also found in the *Thornhill* case and has been called the sixth rule laid down therein.[31] It reads:

> "Where .... there is a dispute as to the facts and circumstances under which the injury was inflicted, it cannot be said that they are known in the legal sense until they have been found by the jury, and, if the jury is unable, for any reason, to determine from the evidence what the facts and circumstances are, they never, in the legal sense, become known, and consequently in such a case the inference of negligence drawn from the infliction of the injury remains in effect and determines the defendant's liability."[32]

With a slight modification, these rules of the *Thornhill* case were followed for almost twenty years with little deviation.[33] Some modification was imposed in the case of *Alabama & G. S. Ry. v. Daniell,*[34] one of the first cases arising after the *Thornhill* case. The court there held that it was error to instruct the jury that the defendant, after proof of injury within the terms of the statute, must exculpate itself from blame. It was said:

> "On the contrary, under the statute, as before its enactment, when the facts and circumstances have been ascertained the jury must be able to say therefrom that the defendant was guilty of negligence; otherwise he cannot be held liable."[35]

The court very seriously impaired this modification, however, in the case of *Yazoo & M. V. R. R. v. Messina.*[36] It there held that the giving of the instruction condemned in the *Daniell* case would not constitute reversible error in all instances.

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[30]Alabama & V. Ry. v. Thornhill, 106 Miss. 387, 410, 63 So. 674, 678 (1913).

[31]New Orleans & G. N. R. R. v. Walden, 160 Miss. 102, 133 So. 241 (1931).

[32]Alabama & V. Ry. v. Thornhill, 106 Miss. 387, 410, 63 So. 674, 679 (1913).

[33]The cases of Gulf, M. & N. R. R. v. Brown, 138 Miss. 39, 102 So. 855 (1925) and Columbus & G. Ry. v. Fondren, 145 Miss. 679, 110 So. 365 (1926) are *contra* to the case of Alabama & V. Ry. v. Thornhill, 106 Miss. 387, 63 So. 674 (1913) and the cases following it, but the Fondren case was expressly overruled and the Brown case was overruled by implication by the case of Columbus & G. Ry. v. Lee, 149 Miss. 543, 115 So. 782 (1938).

[34]108 Miss. 358, 66 So. 730 (1914).

[35]Alabama & G. S. Ry. v. Daniell, 108 Miss. 358, 370, 66 So. 730, 733 (1914). Accord: Hines v. McCullers, 121 Miss. 666, 83 So. 734 (1920); Davis v. Temple, 129 Miss. 6, 91 So. 689 (1922).

[36]109 Miss. 143, 67 So. 963 (1915). Accord: Davis v. Elzey, 126 Miss. 789, 88 So. 630 (1921).

The questions relating to the statute seemed fairly well settled in view of these holdings, until in 1929 the case of *Western & A. R. R. v. Henderson*[37] involving a similar Georgia statute[38] reached the Supreme Court of the United States. The court held that this statute violated the due process clause of the Fourteenth Amendment to the Federal Constitution,[39] and distinguished the

[37]279 U. S. 639 (1929).

[38]"A railroad company shall be liable in damages done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company or for damages done to any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." GA. CODE ANN. (Michie, 1926) § 2780.

This statute was amended by Ga. Laws 1929, c. 315 [now GA. CODE ANN. (Michie, Supp. 1930) § 2713(1)]. Under this new statute it was held error to instruct the jury that ". . . . if the railroad shows to your satisfaction . . . . the case required by the law . . . . the *prima facie* (evidence) would be rebutted." Seaboard A. L. Ry. v. Fountain, 173 Ga. 593, 160 S. E. 789 (1931).

It might be noted that other states have statutes making the fact of a railroad crossing accident presumptive of the railroad's negligence. See among others, ALA. CODE (Michie, 1928) § 9955; ARK. DIG. STAT. (Pope, 1937) §§ 11138, 11144; FLA. COMP. LAWS (1927) § 7051.

The Alabama provision apparently has been construed in accord with the Turnipseed case. Louisville & N. R. R. v. Green, 222 Ala. 557, 133 So. 294 (1931). But the court later said that the burden shifts to the railroad to establish due care by evidence to the reasonable satisfaction of the jury. Birmingham B. R. R. v. Walkins, 226 Ala. 197, 146 So. 279 (1933).

[39]The doctrine of the Henderson case has been severally criticized by various writers. Especially is this true in Morgan, *Federal Constitutional Limitations upon Presumptions Created by State Legislation* in HARVARD LEGAL ESSAYS (1934) 323, 344. "If Mr. Justice Butler's concept of logical connection in the crossing case be accepted, the fact of the collision cannot be used as the basis for an inference that defendant was negligent. By the same reasoning it cannot be used as the basis for an inference that plaintiff was negligent. As to the conduct of each participant there are just two possibilities and no more, due care or negligence. It would seem to follow that the fact of Collision cannot be used as the basis for an inference that either was in the exercise of due care. If by placing the burden of proving his own due care upon defendant the court necessarily permits the fact of collision to be used as evidence of defendant's negligence, what escape is there from the conclusion that by putting the burden of proving plaintiff's negligence upon defendant, the court necessarily permits the jury to use the fact of collision as evidence of plaintiff's due care? And if this is true, how can the burden of persuasion be allocated in such an action without violating the due process clause? Is it possible that a common-law rule fixing the burden does not permit a jury to use a specified fact as evidence, but that a statutory rule in the same terms does necessarily permit? For example, the common-law rule in Massachusetts requires a plaintiff in a negligence case to prove his own due care by the same measure of persuasion as it requires him to prove defendant's negligence. A modern Massachusetts statute purports to change that rule by putting the burden of proving plaintiff's contributory negligence upon the defendant. Is it possible that this statute is unconstitutional in making the Massachusetts rule conform to the common law as declared by the United States Supreme Court? It is all very puzzling unless one postulates that Mr. Justice Butler, although expressly stating that the statute put the burden of proof upon the defendant, nevertheless regarded that burden as still resting upon the plaintiff. Of course, if the only evidence of defendant's negligence

holding from that of the *Turnipseed* case, which upheld the constitutionality of the Mississippi statute, because of the wording of the Georgia statute[40] and the interpretation given it by the courts of that state.[41] This was on the basis that the Georgia statute

was the fact of the collision, and if plaintiff still had the burden of persuading the jury that defendant was negligent, then the court by allowing the jury to find negligence necessarily permitted it to consider and weigh the evidence of the collision against the evidence tending to show due care. But to accept such a solution of the puzzle is to accuse the learned justice either of something like mental incompetence or of a hurried attempt to phrase his emotional reactions in the vague but plausible language of presumptions. Whatever the explanation, the decision is most disturbing because it further obfuscates the law governing presumptions and expresses an entirely false conception of the function of the burden of persuasion; and it makes the validity of the enactment stand upon the slippery footing of the court's notions as to the relation in logic, or lack of it, between two or more given facts." The same writer continues at page 354, n. 32: "It may be a symptom of intellectual obtuseness to show curiosity about the court's failure even to mention Easterling Lumber Company v. Pierce, 235 U. S. 380 (1914). In that case the trial judge, in applying Chapter 215 of the Laws of 1912 of Mississippi to a case involving an injury which occurred prior to the passage of the statute, charged the jury that if the plaintiff was injured by the running of defendant's engine or locomotive, the burden was upon defendant to prove, by a preponderance of the evidence, that its negligence did not cause the injury of the plaintiff. The statute in words made proof of the injury *prima facie* evidence of defendant's negligence; it was clearly interpreted as putting the burden of persuasion upon defendant. The Supreme Court of Mississippi held this charge correct [106 Miss. 672, 64 So. 461 (1914).] On writ of error to the Supreme Court of the United States, Chief Justice White delivered a memorandum opinion for the court. After pointing out that previous decisions had put beyond dispute the validity of a statute which abolishes the fellow servant rule, the Chief Justice considered the objection to the statute above mentioned and said: 'The objection to the second statute is that it was wanting in due process because retroactively applied to the case since the statute was enacted after the accident occurred. But the court below held that the statute cut off no substantive defense but simply provided a rule of evidence controlling the burden of proof. That as thus construed it does not violate the Fourteenth Amendment is also so conclusively settled as to again require nothing but a reference to the decided cases.'"

See also: Bailey v. Alabama, 219 U. S. 219 (1911); McFarland v. American Sugar Co., 241 U. S. 79 (1916); Manley v. Georgia, 279 U. S. 1 (1929); Morrison v. California, 291 U. S. 82 (1934).

See also: Brosman, *The Statutory Presumption* (1930-31) 5 TULANE L. REV. 17, 178; Keeton, *Statutory Presumptions; Their Constitutionality and Legal Effect* (1931) 10 TEX. L. REV. 34; *Developments in the Law—Evidence* (1933) 46 HARV. L. REV. 1138; White, *The Burden of Proof of Negligence in Running-Down Cases* (1938) 6 CAMB. L. J. 404; Martin, *The Burden of Proof as Affected by Statutory Presumptions of Guilt* (1939) 17 CAN. B. REV. 37; Note (1927) 43 HARV. L. REV. 100; (1929) 17 CALIF. L. REV. 569; (1929) 42 HARV. L. REV. 1076; (1929) 27 MICH. L. REV. 951; (1929) YALE L. J. 1145; (1934) 22 CALIF. L. REV. 420; (1934) HARV. L. REV. 102.

[40]See note 38, *supra*.

[41]"Upon the mere fact of collision and resulting death, the statute is held to raise a presumption that defendant and its employees were negligent in each of the particulars alleged, and that every act or omission in plaintiff's specifications of negligence was the proximate cause of the death, and it makes defendant liable unless it showed due care in respect of every matter alleged against it. And, by authorizing the jury, in the absence of evidence,

". . . . as construed in this case created an inference that is given effect of evidence to be weighed against opposing testimony, and is to prevail unless such testimony is found by the jury to preponderate.

"The presumption raised . . . . is unreasonable and arbitrary . . . ."[42]

The first case to arise in Mississippi after the decision of the *Henderson* case was one in a Federal District Court of Mississippi.[43] It was there held that the interpretation given our statute by the courts of Mississippi, as exemplified by the cases of *Columbus & G. Ry. v. Lee*,[44] and *Columbus & G. Ry. v. Fondren*,[45] (both of which were in accord with the *Thornhill* case) was unconstitutional and the verdict of the jury in the trial of the case on that theory was set aside and a new trial awarded.

The statute then came up in the Mississippi Supreme Court in the case of *New Orleans & G. N. R. R. v. Walden*,[46] and a result in complete accord with that reached in the Federal District Court (although that case was not cited in the opinion) was reached. The court held that the sixth rule of the *Thornhill* case came clearly within the condemnation of the *Henderson* case and that while the spirit of the fifth rule did not, its practical effect laid it open to such criticism. These two rules of the *Thornhill* case were therefore expressly overruled. The court said:

"What we here hold . . . . is that when, in an action for damages from an injury of the character described in the statute, the facts and circumstances of the injury are given in evidence by the plaintiff at any stage of the trial, whether it conflicts with similar evidence of the defendant or not, or are given in evidence by the defendant only, and which evidence the jury is without right to reject, no instruction should be given to the jury on the statutory presumption."[47]

Nonetheless the court limited its holding in this manner:

"There may be cases in which the statutory presumption controls, although rebutting evidence has been given by

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to find negligence in the operation of the train, the court necessarily permitted the presumption to be considered and weighed as evidence against the testimony of defendant's witnesses tending affirmatively to prove such operation was not negligent in any respect (citing cases) . . . ." Western & A. R. R. v. Henderson, 279 U. S 639, 641 (1929).

[42]Western & A. R. R. v. Henderson, 279 U. S. 639, 644 (1929).

[43]Wickton v. Louisville & N. R. R., 45 F. (2d) 615 (S. D. Miss. 1930).

[44]149 Miss. 543, 115 So. 782 (1928).

[45]154 Miss. 40, 121 So. 838 (1929).

[46]160 Miss. 102, 133 So. 241 (1931). This is the present leading authority on the statute and has been heretofore discussed in the body of this note.

[47]New Orleans & G. N. R. R. v. Walden, 160 Miss. 102, 116, 133 So. 241, 246 (1931).

> the defendant; for example, when the plaintiff's evidence does not disclose the facts and circumstances of his injury, and the jury has the right to, and does, reject the defendant's rebutting evidence."[48]

Since this decision the Supreme Court of our state has consistently adhered to this attitude.[49]

In view of a later decision[50] of the Supreme Court of the United States, it may be that the conclusion of the Mississippi Supreme Court that no instruction based on the statute may be given is not compelled by any limitation of the Federal Constitution.[51]

In the *Turnipseed* case it was held necessary for the validity of a statute such as that here under consideration, only that there be

> ". . . . some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not operate to preclude the party from the right to present his defense to the main fact thus presumed."[52]

In the *Henderson* case[53] it was held that there is no logical connection between the happening of a railroad crossing accident and the negligent operation of the train.[54] Yet the same court has held

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[48]N. O. *etc.* R. R. v. Walden, 160 Miss. 102, 116, 133 So. 241, 246 (1931). Accord: New Orleans, M. & C. R. R. v. Harrison, 105 Miss. 18, 61 So. 655 (1913).

[49]Eastman, Gardiner & Co. v. Sumrall, 160 Miss. 792, 133 So. 212 (1931); St. Louis & S. F. Ry. v. Nichols, 161 Miss. 795, 138 So. 364 (1931); Adams-Newell Lbr. Co. v. Jones, 162 Miss. 517, 139 So. 315 (1932); Louisville & N. R. R. v. Cuevas, 162 Miss. 521, 139 So. 397 (1932); Columbus & G. Ry. v. Dunlap, 164 Miss. 709, 145 So. 646 (1933).

[50]Atlantic C. L. R. R. v. Ford, 287 U. S. 502 (1932).

[51]*Id.* at 506. In this case an instruction was given to the jury in which we find these words: ". . . . But such a presumption would be rebuttable by evidence, and the jury should consider any and all evidence that may be in the case in determining the question of proximate cause (the fact presumed) . . . . The failure to give these signals raises that presumption, but it is rebuttable; it is not a conclusive presumption. That may be rebutted by the defendants in its (their) evidence, and as stated here, all the evidence must be considered in determining the question of proximate cause." The court affirmed the judgment of the court below after special attention to this instruction.

[52]Mobile, J. & K. C. R. R. v. Turnipseed, 219 U. S. 35, 43 (1910).

[53]Western & A. R. R. v. Henderson, 279 U. S. 639 (1929).

[54]*Id.* at 642. "The mere fact of collision between a railway train and a vehicle at a highway grade crossing furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company, or of the traveler on the highway, or of both, or without the fault of anyone." Yet the Supreme Court of the United States after suggesting this distinction between the instant case and the case of Mobile, J. & K. C. R. R. v. Turnipseed, 219 U. S. 35 (1910) distinguishes the two cases on this ground: "Each of the state enactments raises a presumption from the fact of injury caused

that a statute raising such a presumption is not void for denial of due process.[55] From these decisions it seems that the attitude of the Supreme Court of the United States is not entirely settled in cases of this character, and that necessarily the future holdings on similar questions are in doubt.

It would seem that the application of the statute today requires these inquiries. Was the plaintiff injured by the running of a train?[56] What duty did the railroad owe to the plaintiff? Did the defendant discharge this duty? Was the failure of the defendant to discharge his duty the proximate cause of the plaintiff's

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by the running of locomotives or cars. The Mississippi statute created merely a temporary inference of the fact that vanished upon the introduction of opposing evidence. . . . . That of Georgia as construed in this case created an inference that is given effect of evidence, to be weighed against opposing testimony, and is to prevail unless such testimony is found by the jury to preponderate." Western & A. R. R. v. Henderson, 279 U. S. 639, 643 (1929).

[55]Seaboard A. L. Ry. v. Watson, 287 U. S. 86 (1932).

[56]If the plaintiff (or his property, etc.) is actually struck by a moving train, (or car, etc.) there is no question that his injury is within the terms of the statute.

The statute has also been held to apply in case fire has been set by a running train. Louisville, N. O. & T. R. R. v. Natchez, J. & C. R. R., 67 Miss. 399, 7 So. 350 (1889); Alabama & V. Ry. v. Barrett, 78 Miss. 432, 28 So. 820 (1900); Drake v. Yazoo & M. V. R. R., 79 Miss. 84, 29 So. 788 (1901). It is interesting to note that the first of these three cases is unique as it is the only case in which a railroad was directly benefited by the operation of the *prima facie* statute. This case is also interesting because it contains *dictum* to the effect that the statute would be applicable even though the fire was set while the locomotive was temporarily at rest.

In certain situations it is not necessary that the plaintiff be struck (in the sense of a collision) by a moving train. A passenger may be injured by an unusual jolt or jerk of the train and the injury will be within the terms of the statute. Gulf & S. I. R. R. v. Meyers, 114 Miss. 458, 75 So. 244 (1917). See also Gulf & S. I. R. R. v. Odum, 133 Miss. 543, 98 So. 60 (1923). But if an animal is frightened by a train and in its fright injures itself, the injury is not in the terms of the statute. Illinois C. R. R. v. Weathersby, 63 Miss. 581 (1886); Lowe v. Alabama & V. Ry., 81 Miss. 9, 32 So. 907 (1902); Mobile, J. & K. C. R. R. v. Kea, 96 Miss. 195, 50 So. 628 (1909). Nor is the injury of a pedestrian struck by a descending crossing-gate beam within the terms of the statute. McKenna v. Alabama & V. Ry., 87 Miss. 482, 40 So. 258 (1905).

It should be noted here that the statute is held to have no application in suits by employees for injuries within the terms of the Federal Employers' Liability Act. This question was decided in the case of New Orleans & N. E. R. R. v. Harris, 247 U. S. 367 (1918), *rev'g* 71 So. 913 (Miss. 1916). It was there held that the statute was one involving a change of the burden of proof and therefore a matter of substance. This reasoning was *contra* to that employed in the case of Mobile, J. & K. C. R. R. v. Turnipseed, 219 U. S. 35 (1910) where the statute was held to be but a rule of evidence. These two cases are not necessarily *contra* according to the view taken in Cook, *"Substance" and "Procedure" in the Conflict of Laws* (1933) 42 YALE L. J. 333. The cases of New Orleans & N. E. R. R. v. Scarlet, 249 U. S. 528 (1919), *rev'g* 115 Miss. 285, 76 So. 265 (1917) and Yazoo & M. V. R. R. v. Mullins, 249 U. S. 231 (1919), *rev'g* 115 Miss. 343, 76 So. 147 (1917) are in accord with the Harris case. See also Cooper, *The Federal Employers' Liability Act* (1931) 4 MISS. L. J. 97, 101.

injury? In other words, it is not necessary that the defendant show all the circumstances surrounding the injury,[57] or even what the plaintiff was doing at the time.[58] It is only necessary that it be shown, by evidence of either party, what duty was owed the plaintiff and that this duty was discharged in order that the effect of the statute be avoided.[59] This rule would seem too elementary to need restatement, but it is only within the last few years that the application of the statute has been reduced to these terms.[60] Limiting former holdings,[61] the court now holds that the railroad is compelled to show less concerning an injury to a trespasser than to a passenger or licensee, on the theory that the trespasser was owed a lesser duty.[62] If the defendant is shown to have violated no duty owed by him to the plaintiff, it is immaterial whether or not *all* the facts and circumstances be shown.[63]

The application of the statute on the trial is still controlled by the first four rules of *Alabama & V. Ry. v. Thornhill*,[64] together with the doctrine of the case of *New Orleans & N. E. R. R. v. Walden*.[65]

C. Sidney Carlton

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[57]The rule was formerly otherwise. See cases cited note 17, *supra*.

[58]The rule was formerly otherwise. Yazoo & M. V. R. R. v. Landrum, 89 Miss. 399, 42 So. 675 (1906); Jefferson v. So. Ry., 105 Miss. 571, 62 So. 643 (1913); Miss. C. R. R. v. Robinson, 106 Miss. 896, 64 So. 838 (1914).

[59]Mobile & O. R. R. v. Robinson, 132 Miss. 841, 96 So. 749 (1923); Murray v. Louisville & N. R. R., 168 Miss. 513, 151 So. 913 (1934). Note (1938) 10 MISS. L. J. 305, 315.

[60]The first case seems to be Mobile & O. R. R. v. Robinson, 132 Miss. 841, 96 So. 749 (1923).

[61]Yazoo & M. V. R. R. v. Landrum, 89 Miss. 399, 42 So. 675 (1907); Jefferson v. So. Ry., 105 Miss. 571, 62 So. 643 (1913).

[62]See cases cited note 55, *supra*.

[63]Murray v. Louisville & N. R. R., 168 Miss. 513, 151 So. 913 (1934). Note (1938) 10 MISS. L. J. 305, 315.

[64]106 Miss. 387, 63 So. 674 (1913).

[65]160 Miss. 102, 133 So. 241 (1931).

RECENT DECISIONS

INSURANCE—INSURABLE INTEREST—ACCIDENT INSURANCE BY EMPLOYER ON ALL INJURIES OF HIS EMPLOYEES WITHOUT REGARD TO LEGAL LIABILITY

The defendant, instead of conforming to the ordinary plan of indemnity insurance against liability for injuries to employees, took out 191 separate accident insurance policies with the plaintiff agent's company, one for each man in his employ. The policies were all made payable to the defendant and he agreed to pay all the premiums. Action was brought on the check given for premiums. The defense was lack of insurable interest. HELD: The employer has sufficient insurable interest in his employees to warrant his taking out insurance for injuries to them even beyond those which are not attributable to his negligence and for which he is not legally liable.[1] *Neely v. Pigford*, 181 Miss. 306, 178 So. 913 (1938).

The requirement of insurable interest probably dates as far back as the case of *Godsal v. Baldero*,[2] relied on for many years to show that a contract of insurance is simply a contract of indemnity, not only requiring an interest in the assured in order to give it validity at its inception, but continuing good so far as it is rendered so by the permanence of such interest. The language of the opinion seems to indicate it was founded in common law, but it is more likely based on the statute of 14 Geo. 3, c. 48, which, in express terms, limits insurable interest on another's life to those who have an interest therein and restricts recovery from insurers to the amount or value of such interest.

Since then the various courts have uniformly travelled the same path in defining and elaborating that which will be interest in human life and health sufficient to support a contract of insurance.[3] The general rule is well stated

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[1]There was no contention raised or discussion made that the insurable interest of the employer extended on his employees beyond the hours of employment; that is, with respect to injuries occurring during the employee's free time and outside of his working hours.

[2]9 East. 72 (K. B. 1807).

[3]In the following cases there is held existent a sufficient insurable interest between: *Parent and child*: Springfield Mut. Ass'n. v. Atnip, 169 Ark. 968, 279 S. W. 15 (1926); Betten v. Williams, 277 Ill. App. 353 (1935) (father may insure his life in favor of child and proceeds cannot be reached by creditors); Rosenberg v. Robbins, 289 Mass. 402, 194 N. E. 291 (1935); Parish v. Missouri Mut. Ass'n., 8 S. W. (2d) 1018 (Mo. 1928); Home Benefit Ass'n. v. Salvato, 295 S. W. 638 (Tex. 1927). *Brother and sister*: Century Life Ins. Co. v. Custer, 178 Ark. 304, 10 S. W. (2d) 882 (1928) (brothers have insurable interest in lives of each other by virtue of relationship alone); Hodge v. Globe Mut. Life Ins. Co., 274 Ill. App. 31 (1935) (insured decedent's sister had insurable interest in life of insured, not altered by fact that she and her husband paid premiums); Inter-Southern Life Ins. Co. v. Stephenson, 246 Ky. 694, 56 S. W. (2d) 332 (1933); *In re* Montgomery's Estate, 299 Pa. 452, 149 Atl. 705 (1930); Rogers v. Atlantic Life Ins. Co., 135 S. C. 89, 133 S. E. 215 (1926). *Husband and wife*: Rosenberg v. Robbins, 289 Mass. 402, 194 N. E. 291 (1935); Bowers v. Mo. Mut. Ass'n., 333 Mo. 492, 62 S. W. (2d) 1058 (1933); 1 COUCH, CYCLOPEDIA OF INSURANCE LAW (perm. ed. 1929) 756.

Creditor allowed an insurable interest up to the extent of the debt and premiums or assessments paid by creditor to keep policies alive. Excess insurance held void: Midland Nat'l. Bank of Minneapolis v. Dakota Life Ins. Co., 277 U. S. 346 (1928); Metcalf v. Montgomery, 229 Ala. 156, 155 So. 582 (1934); Livesay v. First Nat'l. Bank, 57 S. W. (2d) 86 (Tex. Com. App. 1933).

in the case of *Warnock v. Davis*.[4] There must be a reasonable ground, founded on the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the insured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the insured. Such policies tend to create a desire for the event and are, independently of statute, condemned as being against public policy.[5]

It is enough that financial loss or disadvantage will result from the death of the insured to the person procuring the policy.[6] Corporations and other employers are sometimes allowed to insure the life of important officers, or even certain employees, where the insured's continued employment is necessary to the profitable operation of the business. The officer is, in such cases, an exceptionally capable manipulator and financier, and the employee is a skilled artisan or technician whose work is peculiarly valuable in his particular field. The loss of the services of such people is a distinct handicap, and where the policies on their lives are consummated with the *bona fide* purpose of protecting the corporation in event of their death, it is not obnoxious to public policy.[7] As to the ordinary employee, whose services are not indispensable and can easily be duplicated, insurance on him in favor of his employer has quite generally been limited to employers' liability contracts.

Employers' liability insurance and workmen's compensation insurance under statute have been developed in an attempt to provide protection to the employer against the liability which the common law places on him for injuries occurring to those in his employ. But this type of insurance calls for actual loss to the employer in being forced to pay, through court action and judgment, the employee's claim for damages as a result of injuries sustained.[8]

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[4]104 U. S. 775 (1881).

[5]Conn. Mut. Life Ins. Co. v. Luchs, 108 U. S. 498 (1882); Hess v. Segenfelter, 127 Ky. 444, 105 S. W. 476 (1907); Gerard v. Metropolitan Life Ins. Co., 167 Miss. 207, 148 So. 793 (1933); Keystone Mut. Ben. Ass'n. v. Norriss, 115 Pa. St. 446, 8 Atl. 638 (1887); Cheeves v. Anders, 87 Tex. 287, 28 S. W. 274 (1894); Smith v. Metropolitan Life Ins. Co., 123 S. W. (2d) 956 (Tex. Civ. App. 1938). In New Jersey the tendency of judicial opinion seems in favor of the proposition that assured need not have an interest in the life of the insured in order to support the contract of insurance. See Trenton Mut. Life Ins. Co. v. Johnson, 24 N. J. L. 576 (1851).

[6]20 C. J. Cyc. 706.

[7]U. S. v. Supplee-Biddle Hardware Co., 265 U. S. 189 (1923); First-Columbus Nat. Bank v. Pate Lbr. Co., 163 Miss. 691, 141 So. 767 (1932); American Trust Co. v. Va. Life Ins. Co., 173 N. C. 558, 92 S. E. 706 (1917); Keckley v. Coshocton Glass Co., 86 Ohio St. 213, 99 N. E. 299 (1912); United Security Life Ins. Co. v. Brown, 270 Pa. 270, 113 Atl. 446 (1921); Wurzburg v. N. Y. Life Ins. Co., 140 Tenn. 59, 203 S. W. 332 (1918); Mutual Life Ins. Co. v. Board, Armstrong & Co., 115 Va. 836, 80 S. E. 565 (1914); 2 COUCH, CYCLOPEDIA OF INSURANCE LAW (perm. ed. 1929) 1121, § 383.

But see: Security Life Ins. Co. v. Schott, 30 Ohio Cir. Ct. 656, *aff'd*, 7 Ohio N. P. (N. S.) 548 (director not indebted to the corporation and no evidence to show that upon his death or his withdrawal from the business it would suffer any serious or lasting detriment thereby—no insurable interest). An association is held to be without insurable interest in life of member or stockholder: Trinity College v. Travelers' Ins. Co., 113 N. C. 244, 18 S. E. 175 (1893); Tate v. Commercial Bldg. Assn., 47 Va. 74, 33 S. E. 382 (1899).

[8]Employers' Liability Assur. Corp. v. Merrill, 155 Mass. 404, 29 N. E. 529 (1892); Standard Ins. Co. v. Bambrick Bros. Constr. Co., 163 Mo. App. 504, 143 S. W. 845 (1912) (insurable interest with respect to liability insurance

The indemnification of the employer is all that is sought through the policy, and if no judgment is procured by the injured employee, no recovery is available on the policy.[9] Liability does not become loss until the person liable parts with, or is deprived of, something of value in consequence of his liability.[10]

The defendant here did not contract for the issuance of these policies in order merely to protect himself against possible loss in case an employee should meet with accident and the defendant be required to make adequate compensation. Such would have been entirely valid and sanctioned as being supported by proper insurable interest.[11] The defendant, however, went beyond this and made himself beneficiary upon the happening of injury to an employee, this though the defendant be quite blameless and completely free from all legal liability.

The court, in upholding these policies, states that present-day practices of employers are such that hospital services are usually immediately made available to the injured employee and suitable care and attention afforded him—even to extent of providing for his helpless family during his disability and giving him proper burial should death result—all this though no legal duty to do so arises.[12]

By such reasoning the court has assumed a potential insurable interest which takes existence upon the employer's fulfilment of these mentioned moral obligations.[13] And should the employer actually pursue such humane and praiseworthy practices, there is reason to believe that the requirement of insurable interest will be satisfied. The problem of administration of the policy is the difficulty encountered. Will the employer actually take proper care of his injured employees? The policy is due and payable upon proof of injury. The insurable interest will be determined at some future date and frequently after full payment has been made on the policy. The insurance company may be required to satisfy the policy and then wait to see whether or not the employer will so apply the proceeds as to satisfy the requirements of insurable interest. Is this not an undue burden on the insurance company in order for it to protect its interest?

The court cites authorities by which it attempts to reach a position that will not only enable it to declare an insurable interest resident in any em-

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required in same measure as in ordinary insurance); Mechanics' Nat'l. Bank v. Comins, 72 N. H. 12, 55 Atl. 191 (1903); Carpenter v. U. S. Life Ins. Co., 161 Pa. 9, 28 Atl. 943 (1894).

[9]Globe Indemnity Co. v. Sulpho-Saline Bath Co., 299 Fed. 219 (C. C. A. 8th, 1924); VANCE, INSURANCE (2d ed. 1930) 913.

[10]Stag Mining Co. v. Missouri Fidelity Casualty Co., 209 S. W. 321 (Mo. App. 1919) (contains a full and interesting account of the distinction between contracts of indemnity against loss and contracts of indemnity against liability). See also: Conqueror Zinc & Lead Co. v. Aetna Life Ins. Co., 152 Mo. App. 332, 133 S. W. 156 (1911); McWilliams v. Home Ins. Co., 40 App. Div. 400, 57 N. Y. Supp. 1100 (1st Dept. 1899); 1 JOYCE, INSURANCE (2d ed. 1917) 95.

[11]American Employers' Liability Ins. Co. v. Fordyce, 62 Ark. 562, 36 S. W. 1051 (1896); Stephens v. Pa. Cas. Co., 135 Mich. 189, 97 N. W. 686 (1903); Hoven v. Employers' Liability Assur. Corp., 93 Wis. 201, 67 N. W. 46 (1896).

[12]See Triplett, *Work of the Miss. Sup. Ct. for Sept. 1937 and Mar. 1938, Terms—Insurance* (1938) 11 MISS. L. J. 30-31.

[13]There seems to be no actual authority for this proposition. No cases have been found involving this problem.

ployer as to accident insurance on all injuries suffered by his employees without regard to legal liability, but also to restrict the plea of lack of insurable interest to the insurer alone.[14] These authorities do not seem to support such a holding. They stand rather for the proposition that where the insurer has recognized the validity of the policy by paying the amount thereof to the beneficiary, or into court, other parties claiming an interest in the fund cannot object on the ground that the beneficiary named in the policy had no insurable interest. This is a vastly different interpretation from that sought to be extracted by the court in the instant case. To support insurable interest in such a manner might well lead to quite embarrassing and harmful results.

There is another plan which possibly would effect the laudable ends attempted to be reached in this case, in a far more salutary and satisfactory manner to all parties concerned. Let the customary employers' liability policy be enlarged so as to include not only indemnification for losses arising from injuries legally attributable to the employer's own negligence, but also for those injuries for which he cannot be held accountable but where he has gone to the expense of providing proper care and medical needs necessary. Thus the extent of his claim must be fully determined before the insurance company makes final settlement and the problem of insurable interest raises no difficulties. Where dereliction of the employer's moral duty to perform the services occurs, no return can be expected or gained under the policy. There is greater facility of administration in this type of insurance policy than exists where the indemnity must be paid up before the coming into existenct of facts which will relate back so as to lend validity to the contract.

The court might well have suggested the expansion of employers' liability policies in the manner above indicated as an avoidance of the necessity for supporting contingent liability and compensation therefor, upon an insurable interest which, conceivably, might never arise. The flexibility of the broadened liability contract and its genuine competence to effect the protection afforded by the ordinary accident policy, without including its disadvantages, are factors which should go far toward gaining the approval of the courts.

Jack Matthews

JURISDICTION OF COURTS—SERVICE OF PROCESS UPON NONRESIDENT PLAINTIFF'S ATTORNEY IN EQUITABLE PROCEEDING FOR INJUNCTION OF ORIGINAL ACTION IN ORDER TO ALLOW EQUITABLE DEFENSE AND DEMAND OVER—EFFECT OF DISMISSAL OF ORIGINAL ACTION

M was sued by a non-resident corporation on a note for $75, and soon thereafter filed suit in chancery court against the corporation to enjoin the prosecution of the law action, averring an equitable set-off against the note

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[14]Langford v. Freeman, 60 Ind. 46, 55 (1877); Farwell v. Johnson, 121 Misc. 556, 201 N. Y. S. 327, 330 (1923); Keckley v. Coshocton Glass Co., 86 Ohio St. 213, 99 N. E. 299 (1912); Pierce v. Metropolitan Life Ins. Co., 46 Ohio App. 36, 187 N. E. 77 (1933); United Security Life Ins. Co. v. Perugini Union Mut. Relief Ass'n., 273 Pa. 554, 117 Atl. 413 (1922); United Security Life Ins. and Trust Co. v. Brown (no. 3), 270 Pa. 273, 113 Atl. 447 (1921); 32 C. J. 1112; 1 COUCH, CYCLOPEDIA OF INSURANCE LAW (perm. ed. 1929) 772, § 295 (". . . . and no one in a contest over proceeds of a life insurance policy can question the validity of the policy for lack of insurable interest where the insurer has paid in full. In fact, only the insurance company can raise the objection of want of insurable interest.")

and an equitable demand over for approximately $6000. Pursuant to the chancellor's citation for the corporation to appear and show cause why the injunction should not issue, *M* had service made on the corporation's attorney. The attorney appeared and asked time to prepare a demurrer for which a week's time was granted. The corporation then nonsuited the law action and the chancellor thereupon held there was nothing before the court on which an injunction could operate and declined to order the writ or to grant a decree *pro confesso* as to the demand over. HELD: Affirmed. *Mattingly's Bakery v. Sparks Milling Co.*, 181 Miss. 198, 179 So. 271 (1938).

The court seems to have predicated its decision on two grounds: first, that service of notice of process on the attorney in such an injunction has never been allowed under Mississippi practice to be made the basis of a demand over against the client; and second, that constitutional requirements of due process militated against holding differently.

Perhaps it would be best to consider first what could constitutionally have been done in such a case. Counterclaims recovered without personal service upon a nonresident have been given effect in state courts.[1] Although the Supreme Court once declared that judgment on a counterclaim could not be recovered against a foreign plaintiff,[2] this statement was distinguished by Justice Holmes in a Massachusetts case.[3] The statute therein involved,[4] allowing a defendant to bring an independent suit against a nonresident merely by serving its attorney in the previous litigation, was later upheld by the Supreme Court.[5] In the recent case of *Adam v. Saenger*,[6] the Supreme Court held valid a California statute[7] allowing service of process of a cross-action to be made on the attorney in the original suit. The case follows the principle that the invocation of jurisdiction constitutes a submission to it, which is illustrated by the many decisions that a defendant who asks for affirmative relief cannot thereafter challenge the court's jurisdiction over him.[8] The foreigner invoked the jurisdiction of the court and it therefore seems fair to compel him to answer the defendant's claim,[9] especially since the difficulties the defendant would encounter in suing in the plaintiff's case might well preclude effective enforcement of his rights.[10]

Had the factual situation in the instant case been the same as that in the case of *Adam v. Saenger*,[11] an upholding of the complainant's claim would

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[1]Collins v. McCook, 17 La. App. 415, 136 So. 204 (1931); Ledbetter v. Mandell, 124 App. Div. 854, 109 N. Y. Supp. 602, (1st Dept. 1931), citing the Arkansas rule.

[2]Dewey v. Des Moines, 173 U. S. 193, 202-203 (1899).

[3]Aldrich v. E. W. Blatchford & Co., 175 Mass. 369, 56 N. E. 700 (1900).

[4]Mass. Gen. Laws (1932) c. 227, § 2, 3.

[5]Frank L. Young Co. v. McNeal Edwards Co., 283 U. S. 398 (1931).

[6]303 U. S. 59 (1938).

[7]Code of Civ. Pro. (Calif. 1937) § 442.

[8]Merchants Heat & Light Co. v. J. B. Clow & Sons, 204 U. S. 286 (1907); Fed. Land Bank of St. Louis v. Gladish, 176 Ark. 267, 2 S. W. (2d) 696 (1928); State *ex rel.* Brickel v. Roach, 122 Ohio St. 117, 170 N. E. 866 (1930).

[9]Partridge v. The Insurance Co., 82 U. S. 573, 580 (1872) (speaking of set-offs and counterclaims).

[10]Note (1931) 29 MICH. L. REV. 604. Mississippi seems to be in accord with this theory and does not limit the recoverable damages in the cross-action to those alleged in the plaintiff's original action in a usual case of set-off; McIntyre et al. v. Forbes Piano Co., 100 Miss. 517, 56 So. 457 (1911); GRIFFITH, MISSISSIPPI CHANCERY PRACTICE (1925).

[11]303 U. S. 59 (1938).

certainly have been constitutional. This case may possibly be distinguished, however, on two grounds. In the Supreme Court case, the crossbill was filed to the original action in the same court; here there was a resort to equity to enjoin the prosecution of the original action and the setting-off and demanding-over of an additional amount. On the basis of the California statutes and decisions which the complaint set out, the Supreme Court there confirmed the cross-action as authorized by California law. The same effect is reached in Mississippi by a more round-about method[12] and the chances are that the Supreme Court could have said that the law in *Adam v. Saenger* was applicable.

The other distinguishing factor in the instant case is that while the plaintiff there dismissed his claim before the cross-action was acted upon, no dismissal took place in *Adam v. Saenger* until after judgment was recovered in the cross-action. The general rule in Mississippi is that dismissal of the original bill carries with it the cross-bill.[13] Where the cross-bill is filed for relief independent of the original bill, this result will not necessarily follow, however.[14] Service here had been had upon the attorney before the original cause was dismissed. It seems plausible to argue that jurisdiction immediately attached and need not be divested by the action of the original plaintiff in dismissing his suit. It is perhaps significant also that the attorney upon whom the process was served actually appeared before the chancellor and asked for time to prepare a demurrer.[15]

It is believed, therefore, that the facts of the instant case are not sufficiently different from those in *Adam v. Saenger* as to require a different constitutional ruling.

The English chancery practice permitted service of process by leave of the court upon an attorney to restrain proceedings at law, when the client was out of the jurisdiction.[16] In this country, the federal courts have allowed service upon a nonresident plaintiff's attorney in cases (1) of injunctions to

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[12]See McIntyre v. Forbes Piano Co., 100 Miss. 517, 56 So. 457 (1911), where the court allowed a resident to set-off a claim arising after institution of replevin suit by nonresident. The replevin suit was enjoined and the resident was given relief in his set-off. There was no mention of how process was served but the facts showed that the nonresident operated a branch office within the state and it is presumed that service was made on the agent there. The original action was never dismissed in this case.

[13]Belcher v. Wilkerson, 54 Miss. 677 (1877).

[14]Dewees v. Dewees, 55 Miss. 315 (1877). The husband filed a bill for divorce and the wife answered and made her answer a cross-bill in which she asked for alimony but did not ask for divorce. The husband dismissed the original bill and the court ordered the case to be retained for a final decree on the cross-bill. This was not limited to divorce actions, because the court in its opinion cited Wickliffe v. Clay, 1 Dana 585 (Ky. Ch. 1833) laying down a similar rule in a suit on a contract. This is the general rule; Worrell v. Wade's Heirs, 17 Iowa 96 (1864).

[15]The court held that this factor should not affect the result because the attorney was not authorized to appear and his being so retained in one suit would not make him an agent for the client as to other suits, citing Hirsch Bros. & Co. v. Kennington Co., 155 Miss. 242, 124 So. 344 (1929); Scarborough v. Bradley, 256 S. W. 349 (Tex. Civ. App. 1923); 7 C. J. S., 905.

[16]Anderson v. Lewis, 3 Bro. C. C. 429, 29 Eng. Rep. 625 (Ch. 1792); Gardiner v. Mason, 4 Bro. C. C. 479, 29 Eng. Rep. 998 (Ch. 1793).

stay proceedings at law and (2) of cross-bills in equity,[17] but it was indicated in these cases that the extension of the rule is limited to cross-bills seeking only defensive relief.

The fullest discussion of the problem seems to be in *Lowenstein v. Glidewell.*[18] The court in that case admitted that a cross-bill in equity[19] might be filed against the nonresident plaintiff by service upon his attorney, but declared that the purpose of the rule was to prevent such plaintiff from unjustly invoking the jurisdiction of the court in his favor, and obtaining "as the fruits of that jurisdiction, a judgment or decree to which he was not in equity entitled, by remaining beyond the jurisdiction of the court whose jurisdiction on the very subject matter, and against the very party, he had himself first invoked." It then added that the "reason of the rule would seem to limit it in equity cases to cross-bills either wholly or partially defensive in their character, and to deny its application to cross-bills setting forth facts not alleged in the original bill, and which new facts, though they relate, as they must, to the subject matter of the original bill, are made the basis for the affirmative relief asked."[20]

The holding is a matter of policy, but in the absence of a statute, it seems to be the practice generally followed. There being no such statute in Mississippi the decision in the instant case therefore seems correct. But there is some reason for enacting such a statute allowing jurisdiction in such circumstances.

Alex Gilliam, Jr.

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[17]Hitner v. Suckley, 2 Wash. C. C. 465, 12 Fed. Case No. 6, 543 (C. C. Pa., 1810). (The plaintiff brought an action at law alleging defendant had slandered his title to land. The defendant sought to enjoin the plaintiff from committing waste on the land and the court held that where the bill presented independent controversies the court could not consider the defendant's attorney in that action as representing him in this cause.); Ward v. Seabry, 4 Wash. C. C. 426, 29 Fed. Case No. 17,161 (C. C. Pa., 1823) (the court said that the cross-action was not strictly one because it asked for affirmative relief.); Eckert v. Bauert, 4 Wash. C. C. 370, 8 Fed. Case No. 4,266 (C. C. Pa., 1823) (Defendant having attempted to file bill on equity side of court to carry into effect the award and agreement stated in the case between the parties, the court refused to order service in equity on the defendant's attorney at law to be a good service, except in cross-suits and injunctions to stay proceedings at law on the ground that the defendant resided outside the state.); Kammin v. Stark, 1 Sawy. 547, 14 Fed. Case No. 7,604 (C. C. Ore. 1871) (service allowed upon a non-resident plaintiff's attorney in an injunction to stay proceedings at law); Lowenstein v. Glidewell, 5 Dill. 325, 15 Fed. Case No. 8,575 (C. C. E. D. Ark. 1878); Bartlett v. His Imperial Majesty the Sultan of Turkey, 19 Fed. 346 (C. C. S. D. N. Y. 1884); *Cf.* Death v. Bank of Pittsburgh, 1 Iowa 382 (1855) (Service was made on plaintiff's attorney to appear in an injunction proceeding to enjoin the plaintiff's original action and the court held that this was not allowable under a statute in the state providing for service by publication.)

[18]5 Dill. 325, 15 Fed. Case No. 8,575 (C. C. E. D. Ark. 1878).

[19]The court indicated that this was the same situation as in the case of an injunction to stay proceedings at law.

[20]It was found unnecessary to decide on this point, however, since the plaintiff had dismissed his original bill before service of the subpoena upon the plaintiff's attorneys. The cross-bill asking for affirmative relief, the court ordered it to remain upon the docket until the cross-defendants could be brought into court. This part of the case is not in point with the instant case, since the dismissal in it came after the service of citation on the plaintiff's attorney.

WATERS—RIPARIAN RIGHTS—DEEPENING OF STREAM BY LOWER RIPARIAN OWNER CAUSING SWIFTER FLOW WITH RESULTING EROSION ON PROPERTY OF UPPER RIPARIAN OWNER

Defendant, lower riparian owner, so worked the bed of the stream in the course of cleaning out the bed and mining gravel that a large lake or pond was formed just below the land of the plaintiff, upper riparian owner. The result of this work in the bed of the stream was to accelerate the flow of the water to such an extent that during overflow periods, the plaintiff's land was badly damaged by erosion. HELD: Such operations in the bed of the stream constituted a reasonable use of the bed, and plaintiff is not entitled to damages. *American Sand & Gravel Co. v. Rushing*, 184 So. 60 (Miss. 1938).

Almost the whole law of water courses was founded on the common law maxim, *aqua currit et debet currere*.[1] Water runs and ought to run as it is by natural law accustomed to run. The foundation of the riparian proprietor's rights rested upon this maxim, adopted from the civil law by the common law.[2] This principle applies to prevent the acceleration of the flow of water in a stream to the injury of a lower proprietor.[3]

But this rule, as it was originally developed, soon came to be slightly modified to the extent that a riparian owner might use or treat a stream in a way not exactly consistent with natural conditions, so long as his use was a reasonable one consistent with the rights of other riparian owners. Litigation concerning the use of a stream thus came to center around the question of whether the riparian owner's use was reasonable or not; and different jurisdictions began to develop different standards as to what constituted a reasonable use.

Many of the courts held rather rigidly to the original doctrine. Thus it has been held that a riparian owner, or other person, had no right as against a lower owner to discharge into a stream water which does not naturally flow therein, as, for instance, water diverted from another stream;[4] nor may an upper riparian owner, by straightening the channel of the stream, by opening a dam, or otherwise, substantially increase the flow of the water, to the injury of a lower proprietor.[5] Nor may the flow of drainage water into the natural

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[1]Kauffman v. Griesemer, 26 Pa. St. 407 (1856).

[2]Wholey v. Caldwell, 108 Cal. 95, 41 Pac. 31 (1895).

[3]2 FARNHAM, WATERS (1904) 1608, § 475. One clear exception to the above rule is the case in which a riparian owner is authorized by the legislature to obstruct or increase the flow of a stream, thereby injuring another proprietor. In such case the courts hold that such injury is consequential only, and the injured party can not recover. A further justification of this holding is that a purchaser on a navigable stream buys subject to the state's right to improve and regulate for the benefit of all. Holyoke Water-Power Co. v. Conn. River Co., 20 Fed. 71 (C. C. D. Conn. 1884); Hollister v. Union Co., 9 Conn. 436 (1833); Diamond Match Co. v. New Haven, 55 Conn. 510, 13 Atl. 409 (1888); Canal Comm'rs. v. East Peoria, 179 Ill. 214, 53 N. E. 633 (1889); Brooks v. Improvement Co., 82 Me. 17 (1889); Henry v. Vt. Cent. R. R., 30 Vt. 638 (1858).

[4]Cheeves v. Danielly, 80 Ga. 114, 4 S. E. 902 (1888); Jackman v. Arlington Mills, 137 Mass. 277 (1884); Baltimore v. Appold, 42 Md. 442 (1875); Plattsmouth Water Co. v. Smith, 57 Neb. 679, 78 N. W. 256 (1899).

[5]Kay v. Kirk, 76 Md. 41, 24 A. 326 (1892). Here the upper owner straightened the course of the stream, resulting in so increasing current of stream as to discharge on lower owner's property with such force as to cause injury. *Held*: channel of stream may be changed so long as it does not

stream be hastened if the increase in volume is such as to cause overflow of the banks of the stream to the injury of the land through which it flows.[6] Water having a time relation as well as a space relation, both being fixed by nature, there is no more right in an adjacent proprietor to alter the one than the other.[7] Therefore, the upper owner cannot remove natural ledges of rock in such a way as to flood the lower land.[8]

But "reasonable use" depends not only upon the conditions of the individual stream and the relations of the individual owners[9] but also upon the general topographical conditions of the jurisdiction. Thus, in the arid states of the west a riparian owner is ordinarily allowed to use much more of the waters of the stream (for irrigation purposes) than he would be allowed to use in other states.[10] Correspondingly, in states where land drainage is widely needed for agricultural purposes, the courts are to be found more likely to allow a widening and straightening or overcharge of a small stream.[11] Thus, in Mississippi, it has been held, contrary to the weight of authority, that a riparian owner may collect drainage waters and then discharge these waters into the natural outlet even though such discharge works to increase the flow of the stream beyond its capacity, thereby flooding and damaging the land of the lower owner.[12] A riparian owner may also erect levees and dams to protect himself against flood waters even though such erection results in damage to another riparian owner.[13]

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inflict injury on lower owner, but former must not, by changing direction of flow of stream, so increase or diminish velocity as to cause damage to land of adjoining proprietor, or impair his rightful use of the stream; nor can he make any change or diversion of stream, though on his own land, which would cause washing of mud and debris on land of neighbor, to injury of latter, and which would not have occurred but for change in current of stream. Tillotson v. Smith, 32 N. H. 90 (1855) (*dictum* that if any person, above or below, make any change in natural flow of stream to material injury of owner situate on it, or by any interference prevent the stream from flowing as it was wont to flow, to such injury, he would be liable for damage thereby occasioned); Dubois v. Glaub, 52 Pa. 238 (1866); Fewell v. Power Co., 102 S. C. 452, 86 S. E. 947 (1915).

[6]Schwartz v. Nie, 29 Ind. App. 329, 64 N. E. 619 (1902); McCormich v. Horan, 81 N. Y. 86 (1880); Jenkins v. Wilmington & W. R. Co., 110 N. C. 438, 15 S. E. 193 (1892).

[7]Grant v. Kuglar, 81 Ga. 637, 8 S. E. 878 (1889); Hawks v. Charlemont, 110 Mass. 110 (1872).

[8]Grant v. Kuglar, 81 Ga. 637, 8 S. E. 878 (1889).

[9]Low v. Schaffer, 24 Ore. 239, 33 Pac. 678 (1893).

[10]Clark v. Allaman, 71 Kans. 206, 80 Pac. 571 (1905); McConk Irr. & Water Power Co. v. Crews, 70 Neb. 109, 96 N. W. 996 (1903); Meng v. Coffey, 67 Neb. 500, 93 N. W. 713 (1921).

[11]San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 Pac. 554 (1920). Defendant constructed along bed of stream a channel to carry water, the effect of which was to prevent spreading and percolation, thereby hastening flow through plaintiff's land. Court held plaintiff could not recover if improvement reasonably necessary to protect the property past which water flowed. Dorr v. Simmerson, 127 Iowa 551, 103 N. W. 806 (1905); Mizell v. McGowan, 129 N. C. 93, 39 S. E. 739 (1901); 2 FARNHAM, WATERS, (1904) 1633 § 488.

[12]Drainage Comm'rs v. Drainage Comm'rs, 130 Miss. 764, 95 So. 75 (1922), Weinburg Co. v. Bixby, 185 Cal. 87, 196 Pac. 25 (1921).

[13]Jones v. George, 126 Miss. 576, 89 So. 231 (1921); *cf.* Weinburg Co. v. Bixby, 185 Cal. 87, 196 Pac. 25 (1921).

Actually, these cases are not directly in point with the issue presented in the principal case as to whether or not accelerating the flow of the stream to the injury of another owner is actionable; but they do indicate that the attitude of the Mississippi court is distinctly in favor of allowing improvements both in draining water to a stream and in causing the stream to carry the water off faster—this in the interest of agricultural land drainage and good husbandry. The fact that the defendant's interference with the natural condition of the stream here was caused not in an attempt to drain his land but in mining gravel, was held by the court not to require a different result; he was still using the stream in a reasonable way.[14] It is safe to say that many jurisdictions would disagree with the holding in this case. But the decision is in accord with the previous decisions in this state[15] and is in conformity with its peculiar requirements.

The instant case differs in factual make-up from the usual type of problem in that here the injury caused by the acceleration of the stream was inflicted upon an upper riparian owner by a lower riparian owner. This distinguishing factor was appreciated by the court; but it concluded—correctly, it would appear—that a different result would not be required.[16] The injury is of the same kind and is caused by the same kind of acts as in the usual situation.

Dan H. Shell

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[14]3 FARNHAM, WATERS (1904) 2721; 40 C. J. 1188.

[15]The early case of Mississippi Mills Co. v. Smith, 69 Miss. 299, 11 So. 26 (1891) held that a manufacturing company which had acquired by prescription on the right to cast polluted water into the stream, which, by reason of sluggish current and numerous ponds, was largely precipitated before reaching a lower owner, could not clean out the channel in such way as to hasten the flow and cast polluted water onto the land of the lower owner. Here, however, there was an unusual use made of the stream—a use that was quite inconsistent with agricultural purposes—and the court was perfectly justified in considering the defendant's activities as amounting to an unreasonable use.

[16]In reaching this decision, the court relied upon Pohlman v. Chicago M. & St. P. Ry. Co., 131 Iowa 89, 107 N. W. 1025 (1906). This case involved surface waters and was therefore not controlling, but the discussion in the case seems appropriate. But *cf.* Withers v. Purchase, 60 L. T. (N. S.) 819 (1889), where it was held that after a stream has become filled, a lower riparian owner may not deepen the channel to the detriment of an upper riparian owner; and Rhodes v. Airedale Drainage Comm'rs., L. R. 1 C. P. Div. 402, 35 L. T. (N. S.) 46 (1876), where it was held that a riparian owner might remove shoals from the stream without liability to a lower owner for overflow of the stream by hastening of the flow.

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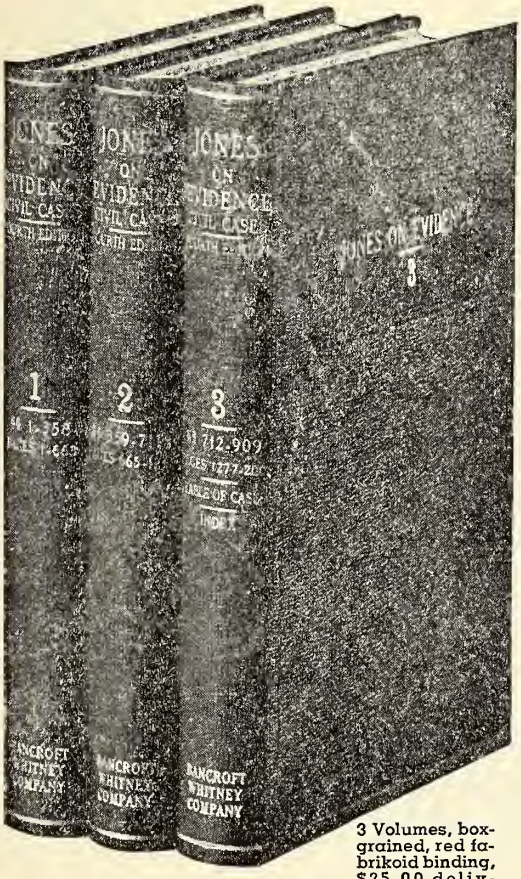

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